108-74

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 164.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY OF BEN. MELTER, APPELLANT,

vs.

THE MASONIC SAVINGS BANK AND JACOB KRIEGER, SR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 30, 1879.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 17th, A. D. 1879.

Present, Hon. John Baxter, circuit judge.

MASONIC SAVINGS BANK ET AL., APPELLANTS,
vs.
HARRY STUCKY, ASS'EE, APPELLEE.

Be it remember' that heretofore, to wit, on the 14th day of April, A. D. 1879, came the appellants, by Messrs. Russell & Helm, their attorneys, and filed a true transcript of the record and proceedings had in the destrict court in this case.

The record and proceedings above referred to are as follows, to wit:

2 *Bill of complaint.*

District court of the United States for the district of Kentucky.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY OF Ben. Melter, complainant,
v.
BEN. MELTER, ELIZABETH MELTER, A. F. Coldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and The Masonic Savings Bank, defendants.

Present, Hon. Bland Ballard, judge of the United States district court for the district of Kentucky.

Be it remembered that heretofore, to wit, on the 29th day of September, A. D. 1877, came the above-named complainant, by Messrs. P. A. Gaertner and D. W. Armstrong, his counsel, and filed their bill of complaint against the above-named defendants.

3 The bill of complaint above referred to is in words and figures as follows, to wit:

In the United States district court for the district of Kentucky.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY OF Ben. Melter, plaintiff,
vs.
BEN. MELTER, ELIZABETH MELTER, A. F. Coldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and The Masonic Savings Bank, defendants. } Bill in equity.

To the honorable Bland Ballard, sole judge of said court, sitting in bankruptcy:

Harry Stucky, assignee in bankruptcy of Ben. Melter, brings this his bill in equity against Ben. Melter, Elizabeth Melter, A. F. Coldeway, Ben.

Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and The Masonic Savings Bank, and thereupon your orator complains and says:

That heretofore, on the day of , A. D. 1877, a petition was filed in the United States district court for the district of Kentucky, by the requisite number of creditors of the defendant Ben. Melter, containing apt averments in that behalf, and praying an adjudication of bank-
4 ruptcy against said Melter in pursuance of the laws of the United States on the subject of bankruptcies; that such proceedings were had under said petition that on the day of August, A. D. 1877, said Melter was duly adjudged a bankrupt by said court; that afterwards, at the first meeting of creditors, the plaintiff was duly elected assignee in bankruptcy of said Melter, was approved by the court, and signified in writing his acceptance of said trust within five days, and that on the day of August, A. D. 1877, the entire estate and property of said bankrupt, except such portions thereof as were by law exempt, was duly conveyed to the plaintiff, as such assignee, by a deed under the hand of John H. Ward, esq., a register in bankruptcy of said court. The defendant Elizabeth Melter is the wife of the aforesaid Ben. Melter, and the defendant The Masonic Savings Bank is a banking corporation, duly chartered and organized under the laws of the State of Kentucky.

The plaintiff further shows to the court that at the date of the
5 filing of the aforesaid petition against him said bankrupt was seized and possessed of certain valuable parcels of real estate lying in the city of Louisville, Kentucky, and more particularly described as follows:

1. A lot of ground, and the improvements thereon, situated on the northwest corner of Second and Breckenridge streets, having a front of forty-seven (47) feet and three (3) inches on said Breckenridge street, and running back on Second street between parallel lines a debt' of two hundred (200) feet.

2. A lot of ground, and the improvements thereon, having a front of twenty-three (23) feet and a depth of one hundred and forty (140) feet, on the northwest corner of First and Gray streets.

3. A lot of ground, and the improvements thereon, beginning at a point thirty (30) feet west of the northwest corner of Twenty-first and Market streets, having a front of feet on said Market, and extending back from the same at right angles between parallel lines feet.

4. A lot of ground, and the improvements thereon, situated on the northeast corner of Third and Breckenridge streets, having a
6 front of forty (40) feet on said Breckenridge street, and extending eastwardly of equal width parallel with Second street one hundred and forty-five (145) feet.

5. A lot of ground, and the improvements thereon, on the east side of Third street, beginning at a point forty feet (40) north of Breckenridge street, and extending thence northwardly along said first-named street forty (40) feet, and running back eastwardly of equal width at right angles one hundred & forty-five (145) feet.

6. A lot of ground, and the improvements thereon, situated on the east side of Third street, beginning at a point eighty (80) feet north of Breckenridge street, and extending thence northwardly along said first-named street forty (40) feet, and running back at right angles of equal width one hundred and forty-five (145) feet.

7. A lot of ground, and the improvements thereon, situated on the north side of Breckenridge street, beginning at a point one hundred and forty-five (145) feet east of Third street, and extending thence eastwardly along said Breckenridge street fifty-five (55) feet, and running back northwardly at right angles of equal width one hundred and twenty (120) feet.

The plaintiff further shows to the court that at the date last aforesaid the defendant A. F. Coldeway claimed and asserted, and he still
7 claims and asserts, a mortgage on the parcel of property marked 1 above to secure an alleged debt of seven thousand ($7,000.00) dollars; that at the date last aforesaid the defendant Ben. Tabben claimed and asserted, and he still claims and asserts, a vendor's lien on the property marked 2 above to secure an alleged unpaid balance of purchase-money to the amount of twenty-nine hundred dollars ($2,900); that at the date last aforesaid the defendant Adam Exner claimed and asserted, and he still claims and asserts, a mortgage on the property marked 2 above to secure an alleged debt of nine thousand and seventy-two dollars and sixty-six cents ($9,072.66); that at the date last aforesaid the defendant Ben. Tabben claimed and asserted, and he still claims and asserts, a mortgage on the property marked 3 above to secure an alleged debt of seven hundred and twenty-five dollars ($725); and the defendant R. A. Fisher claims and asserts a mortgage on the same property to secure an alleged debt of three hundred and fifty dollars ($350); that at the date last aforesaid the defendant Adam Exner claimed and asserted, and he still claims and asserts, a mortgage on the property marked 4 above to secure an alleged debt of five thousand dollars ($5,000); that at the date last aforesaid the defendant Jacob Krieger, sr., claimed and as-
8 serted, and he still claims and asserts, a mortgage on the property marked 4 above to secure an alleged debt of six thousand dollars ($6,000); that at the date last aforesaid the defendant The Masonic Savings Bank claimed and asserted, and it still claims and asserts, a mortgage on the property marked 5 above to secure an alleged debt of six thousand dollars ($6,000); that at the date aforesaid the defendant Adam Exner claimed and asserted, and he still claims and asserts, a mortgage on the property marked 6 above to secure an alleged debt of nine thousand and seventy-two dollars and sixty-six cents ($9,072.66).

The plaintiff further shows to the court that all of the aforesaid several mortgages were actually executed and delivered to the several holders of the same by the aforesaid bankrupt and the defendant Elizabeth Melter, his wife; that the plaintiff does not admit, and he does not by this proceeding mean to admit, the validity of all of said mortgages, and that he will hereafter seek the recession and *evaidence* of certain of them by ap-
9 propriate proceedings, but that all of them are insisted on as valid by their several holders; that each piece or parcel of the aforesaid property is worth much more than the amount of the incumbrance on the same; that none of said pieces or parcels of property are susceptible of division, and that the interest of the general creditors of said bankrupt require that each of said pieces or parcels of property be sold, free of all claims, liens, or incumbrances, and that all such claims, liens, and incumbrances be transferred to the proceeds of the sale of said property to await the further order of the court.

The defendant Elizabeth Melter claims an inchoate right of dower in all of the aforesaid property.

The plaintiff prays a decree empowering him to sell each of the aforesaid pieces or parcels of property, free of all incumbrances and claims whatsoever, and transferring all liens, incumbrances, and claims that may exist or be asserted against the same to the proceeds of the sale thereof, to await the further order of this court; that the value of the defendant
10 Elizabeth Melter's inchoate right of dower in said property, after deducting the amount of such of the aforesaid liens as are valid, for his costs in this behalf expended, and for all other proper relief.

To that end, may it please your honor to grant unto your orator a writ of subpœna, to be directed to the aforesaid Ben. Melter, Elizabeth Melter, A. F. Coldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and the Masonic Savings Bank, thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

P. A. GAERTNER,
D. W. ARMSTRONG,
Solicitors for Plaintiff.

Upon which there issued the following subpœna, to wit:

11 *Subpœna.*

The President of the United States of America to Ben. Melter, Elizabeth Melter, A. F. Coldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and The Masonic Savings Bank, greeting:

You are commanded that you and each of you be and appear before our district court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the second Monday in October next, to answer a bill in equity, exhibited in said court, under the jurisdiction conferred upon it by the bankrupt laws of the United States, by Harry Stucky, assignee of Ben. Melter, bankrupt, which you shall in nowise omit under the penalty of the law. And you are hereby warned that unless you answer, plead, or demur to the aforesaid bill within ten days after the service thereof, if it be made in Jefferson County, or in fifteen days thereafter if the service be made elsewhere in the district, the said bill may be taken for confessed, or you may be proceeded against for contempt.

Witness the Hon. Bland Ballard, judge of the district court of the United States for the district of Kentucky, and the seal of our said court, at the city of Louisville, this 29 day of Sept., A. D. 1877, and of our Independence the 102nd.

AUSTIN BALLARD,
C. D. C. K. D.,
By ROB'T H. BRENT,
His Deputy.

Upon which the marshal made the following return:

Executed Oct. 3rd, 1877, by delivering a copy of the within process to Ben. Melter, Elizabeth Melter, R. A. Fisher, and Jacob Krieger, sr.; also

on the Masonic Savings Bank by delivering a copy of same to Jacob Krieger, president of said bank.

R. H. CRITTENDEN, *U. S. M.*,
By HENRY CRITTENDEN, *D. M.*

Not to be executed on Adam Exner, A. F. Coldeway, & Ben. Tabben.

AUSTIN BALLARD, *Clerk*,
By ROB'T H. BRENT, *D. C.*

12 And on the 8th day of October, A. D. 1877, came The Masonic Savings Bank, by W. O. Dodd, esq., its counsel, and filed its answer herein.

The answer above referred to is as follows, to wit:

Answer of Masonic Savings Bank.

In the United States district court for the district of Kentucky.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY OF Ben. Melter, pl'ff,
vs.
BEN. MELTER ET AL., DEF'TS.
} Answer of Masonic Savings Bank.

The defendant The Masonic Savings Bank says in answer to so much of complainant's bill of complaint as it deems necessary for it to answer, that it is true its codefendant Ben. Melter has been adjudged a bankrupt by this court upon the petition of his creditors, and that complainant was elected assignee of his estate as alleged in said bill; that it is true the said bankrupt was seized and possessed of valuable parcels of real estate in Louisville, Ky., at the time of bankruptcy, and that this defendant
13 at that time had, and still has, a mortgage on the fifth described lot in the said bill, to secure an indebtedness from the said bankrupt to it, amounting to the sum of six thousand dollars ($6,000), which indebtedness and mortgage it now sets out and asserts as follows, to wit:

That on the 28th day of May, 1877, the said bankrupt, Ben. Melter, executed his certain promissory note whereby he undertook, agreed, and promised two years after date to pay to this defendant, or order, the sum of six thousand dollars, with interest from date until paid at the rate of eight per cent. per annum, negotiable and payable at this defendant's office. That contemporaneously with the execution and delivery of the said note, the said bankrupt and his wife, the defendant Elizabeth Melter, executed, acknowledged, and delivered to this defendant their certain deed of mortgage, whereby, in order to secure the prompt payment of the said note, they mortgaged to this defendant the following described lot of
14 ground, with the appurtenances thereon, lying and being in the city of Louisville, county of Jefferson, and State of Kentucky, and designated as follows, to wit:

Beginning at a point 40 feet north of Breckinridge street, on the east side of Third street, thence with Third street northwardly 40 feet, and extending back eastwardly the same width, in lines parallel with Breckinridge street, 200 feet to an alley, being the same property purchased by Ben. Melter at chancery sale and conveyed to him by the commissioner

of the Louisville chancery court by deed recorded in deed book 140, page 351.

It states that the aforesaid indebtedness still exists in whole, that no part thereof has been paid; that the said mortgage was executed simultaneously with the execution of the said note, and is a valid and binding lien upon the said described property, both in law and equity, and that this defendant's lien thereby is prior and superior to any right, title, claim, or interest that the complainant has in or to said property.

15 It has no knowledge or information sufficient to form a belief that the said property is worth much more than the amount of the incumbrance on the same, nor that the interests of the general creditors of the said bankrupt require that the said property be sold free of all claims, liens, and incumbrances thereon; and that all such claims, liens, or incumbrances be transferred to the proceeds of the sale of said property to await the further order of the court.

It says that its debt is not yet due, and that none of the conditions of the said mortgage broken. Said mortgage and note will be filed as part hereof if required.

Wherefore it prays that its lien and interests in the said described property be fully protected in any decree or order of sale that may be made herein, and that it recover its costs of complainant; and for all other such proper relief that the nature of the case may require.

RUSSELL & HELM,
W. O. & J. L. DODD,
Att'ys for Masonic Savings Bank.
JACOB KRIEGER, SR.

16 Subscribed and sworn to before me this 8th day of October, 1877.
WM. EGELHOFF,
Notary Public, J. C.

And on th esame day came Jacob Krieger, sr., by Messrs. Russell & Helm & W. O. & J. L. Dodd, his counsel, and filed his answer herein, is in which words and figures as follows, viz:

Answer of J. Kreiger, sr.

In the United States district court for the district of Kentucky.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY OF Ben. Melter, pl'ff, *vs.* BEN. MELTER, DEF'TS.	Answer of Jacob Krieger, sr.

The defendant Jacob Krieger, sr., for answer to so much of complainant's bill herein as he deems necessary for him to answer, says that he admits his codefendant Ben. Metler was adjudged a bankrupt on the petition of the creditors, and that complainant was chosen assignee of his estate in bankruptcy; that at the date of his bankruptcy the said bankrupt was seized of valuable parcels of real estate in the city of Louisville, and that this defendant had at that time and stills has a mortgage on

17 the fourth described lot in the said bill, to secure an indebtedness to him from the said bankrupt, amounting to the sum of six thousand dollars which indebtedness and mortgage he now sets up and asserts as follows, to wit: That on the 28th day of May, 1877, the said bankrupt, Ben. Melter executed his certain promissory note, whereby he undertook, agreed, and promised, two years after date, to pay to this defendant, or order, the sum of six thousand dollars, with interest thereon, from date until paid, at the rate of eight per cent. per annum, payable semi-annually; that simultaneously with the creation of the said debt and the execution and delivery of the said note, and in order to secure the prompt payment of the same, and the interest thereon according to the terms thereof, the said bankrupt and his wife, the defendant, Elizabeth Melter, executed and acknowledged and delivered their certain deed of mortgage, whereby the' mortgaged to this defendant the following described lot of ground, with the improvements thereon, lying and being in the city of Louisville, county of Jefferson, and State of Kentucky, and designated as follows, to wit:

18 Beginning at the northeastern corner of Third and Breckenridge streets, running thence with Third street northwardly forty feet; thence eastwardly two hundred feet to a twenty-foot alley; thence southwardly forty feet to Breckenridge street; thence westwardly two hundred feet to the beginning, being the same property conveyed to Ben. Melter by J. F. Jefferson by deed of July 22nd, 1865, recorded in d. b. 122, page 494, Jefferson County clerk's office.

He states that all of the aforesaid indebtedness with the accrued interest thereon still exists, and is not yet due, and that none of the conditions of the said mortgage have been broken; that the said mortgage was made when the said debt was created to secure the same, and that the lien created thereby to this defendant is valid and binding both in law and equity, and is prior and superior to any right, title, claim, or interest that the complainant has in or to the said property.

He has no knowledge or information sufficient to form a belief that *that* the said property is worth much more than the amount of the incumbrances on the same, nor that the interest of the general creditors of the said bankrupt require that the said property be sold free of all

19 claims, liens, and incumbrances thereon, and that all such claims, liens, or incumbrances be transferred to the proceeds of the sale of said property, to await the further order of the court.

Said mortgage and note will be filed herein as part hereof if required.

Wherefore he prays that his lien and interests in the said described property be fully protected in any decree or order of sale that may be made herein, and that he recover his costs of complainant, and for all other such proper relief that the nature of the case may demand.

RUSSELL & HELM,
W. O. & J. L. DODD,
Att'ys for Jacob Krieger.
JACOB KRIEGER, SR.

Subscribed and sworn to before me this 8th day of October, 1877.
WM. EGELHOFF,
Notary Public, J. C.

And on the 13th day of February, A. D. 1878, came Harry Stucky, assignee in bankruptcy of Ben. Melter, complainant, by Messrs. P. A. Gaertner and D. W. Armstrong, his counsel, and filed his amended bill herein, which is in words and figures as follows, viz:

Amended bill of compl't.

In the district court of the United States for the district of Kentucky.

HARRY STUCKY, ASSIGNEE, &C., *vs.* BEN. MELTER AND OTHERS. } Amended bill.

To the honorable Bland Ballard, sole judge of said court:

Harry Stucky, assignee in bankruptcy of Ben. Melter, brings this his amended bill in equity against Ben. Melter, Elizabeth Melter, A. F. Coldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and the Masonic Savings Bank, and thereupon your orator complains and says:

That all the allegations and averments contained in his original bill in equity, heretofore filed herein, are true, and he hereby adopts and reaffirms said averments, and each of them, and asks that the same be read and taken as part of this his amended bill with as full force and effect as if they and each of them were here again written.

I. The complainant further shows to the court that the said Ben. Melter, bankrupt, being then and there insolvent, [*or in contemplation of insolvency] did within two months before the filing of said petition against him, in conjunction with his said wife, Elizabeth Melter, execute, acknowledge, and deliver unto the defendant Jacob Krieger, sr., a certain deed of mortgage, whereby said bankrupt and his said wife conveyed to the
21 said defendant Jacob Krieger, sr., the following described real estate in the city of Louisville, which then and there was the property of said bankrupt, to wit: Beginning at the northeast corner of Third and Breckenridge streets, and running thence northwardly with said Third street forty feet; thence eastwardly two hundred feet to a twenty-foot alley; thence southwardly forty feet to Breckenridge street; and thence westwardly to the beginning, being the same property conveyed to said Ben. Melter by J. F. Jefferson by deed dated July 22nd, 1865, and recorded in the Jefferson County clerk's office in deed-book 122, page 494.

The complainant further shows to the court that said deed of mortgage was executed, acknowledged, and delivered as aforesaid with a view to give a preference to the said defendant Jacob Krieger, sr., who was a creditor of said bankrupt, or who then and there had a claim against said Ben. Melter, or was under liability for him; that it was provided in said deed of mortgage that the same should be void on the payment of
22 a certain alleged debt of six thousand dollars, and certain other demands by said bankrupt to said Krieger, and that otherwise the same should remain in effect; and that the said defendant Jacob Krieger, sr., then and there had reasonable cause to believe that said Ben. Melter was insolvent, and knew that said deed of mortgage was made in fraud of the provisions of the laws of the United States on the subject of bank-

*In pencil.

ruptcies. A certified copy of said mortgage is hereto attached as an exhibit, marked A, and is made a part hereof. Said property is the same that is referred to in the complainant's original bill as lot or parcel No. 4, and others of the defendants assert claims thereon, as set out in said original bill.

The complainant further shows to the court that the said Ben. Melter, bankrupt, being then and there insolvent, or in contemplation of insolvency, did, within two months before the filing of said petition against him, in conjunction with his said wife, Elizabeth Melter, execute, acknowledge, and deliver unto the defendant the Masonic Savings Bank
23 a certain deed of mortgage, whereby said bankrupt and his said wife conveyed to the said Masonic Savings Bank the following described real estate, in the city of Louisville, which then and there was the property of said bankrupt, to wit, beginning at a point on the east side of Third street forty feet north of Breckenridge, and running thence with said Third street northwardly forty feet, and extending back eastwardly the same width between lines parallel to said Breckenridge street two hundred feet to an alley, being the same property purchased by said Ben. Melter, at chancery sale, and conveyed to him by deed recorded in chancery court deed book No. 9, page 528, and also in the Jefferson County clerk's office in deed book No. 140, page 351.

The complainant further shows to the court that said mortgage was executed acknowledged with a view to give a preference to the said Masonic Savings Bank, which corporation was a creditor of said bankrupt, or then and there had a claim against him, or was under liability for him; that it was provided in said deed of mortgage that the same should be
24 void on the payment of a certain alleged debt of six thousand dollars, and of certain other demands by said bankrupt, to the said Masonic Savings Bank, and that otherwise it should remain in force and effect; and that the said defendant corporation the Masonic Savings Bank then and there had reasonable cause to believe that said Ben. Melter was insolvent, and it knew that said deed of mortgage was made in fraud of the provisions of the laws of the United States on the subject of bankruptcies. A certified copy of said mortgage is hereto attached as an exhibit, marked B, and is made a part hereof.

Said property is the same that is referred to in the complainant's original bill as lot or parcel No. 5.

3rd. The complainant further shows to the court that the aforesaid Ben. Melter, bankrupt, being then and there insolvent, or in contemplation of insolvency or bankruptcy, did, within three months before the filing of said petition against him in bankruptcy, by the certain deed of mortgage which is described in the first paragraph of this amended bill, con-
25 vey, transfer, and dispose of the certain portions of his property which is described in said first paragraph to the defendant Jacob Krieger, sr., with a view to prevent his said property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the laws of the United States on the subject of bankruptcies, or to defeat the object of or to impair, hinder, impede, or delay the operation and effect of or to evade the provisions of said laws; that the said Jacob Krieger, sr., then and there had reasonable cause to believe said Ben. Melter to be insolvent, or to be acting in contemplation of insolvency,

and he knew said conveyance, assignment, and disposition of said property was made with the view hereinbefore in the third paragraph set out.

The complainant further shows to the court that the aforesaid mortgages are and each of them is void, and he prays that the same and each of them be annulled and set aside, and that the property therein mentioned be decreed to him as part of estate of said bankrupt, free from any lien or incumbrance attempted to be created by said mortgages, or
26 by either of them; and he further prays as in his original bill herein he prayed.

To that end, may it please your honor to grant unto your orator a writ of subpœna, to be directed to the aforesaid Ben. Melter, Elizabeth Melter, A. F. Caldeway, Ben. Tabben, Adam Exner, R. A. Fisher, Jacob Krieger, sr., and the Masonic Savings Bank, thereby commanding them and each of them a certain time, and under a certain penalty therein to be limited, to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

P. A. GAERTNER AND
D. W. ARMSTRONG.

Harry Stucky, being duly sworn, says on his oath that the allegations contained in the foregoing amended bill are true to the best of his knowledge, information, and belief.

27 Sworn to and subscribed before me, by Harry Stucky, this 5th day of February, A. D. 1878.

The exhibits above referred to are as follows, to wit:

EXHIBIT A.

This indenture, made and entered into this 28th day of May, 1877, by and between Ben. Melter and Elizabeth Melter, his wife, of the first part, and Jacob Krieger, sr., of the second part, witnesseth:

That the parties of the first part, for and in consideration of the sum of one dollar cash in hand paid, and the further consideration hereinafter expressed, have bargained and sold, and by these presents do sell and convey, to the party of the second part, a lot of ground, with the appurtenances, in the city of Louisville and State of Kentucky, beginning at the northeastern corner of Third and Breckenridge streets; thence with Third street northwardly forty feet; thence eastwardly two hundred feet to a twenty-foot alley; thence southwardly forty feet to Breckenridge street; thence
28 westwardly two hundred feet to the beginning, being the same property conveyed to the said Ben. Melter by J. F. Jefferson by deed dated 22nd day of July, 1865, and recorded in the Jefferson County clerk's office in deed book 122, page 494. To have and to hold the said property unto the party of the second part, with covenant of general warranty.

But this conveyance is upon the following conditions, to wit: The said Ben. Melter has this day executed his certain promissory note, bearing even date herewith, payable to the party of the second part, or order, for the sum

of six thousand dollars, payable two years after date, with interest from date at the rate of eight per cent. per annum, the interest payable semi-annually, and negotiable and payable at Masonic Savings Bank; and the said first and second parties have further entered into the following agreement, to wit:

First. That if the said Ben. Melter shall fail to pay any of the installments of interest agreed to be paid by the execution of said note at the time said installment becomes due, the said second party may, at its
29 option, treat the principal of said note as also due immediately upon such default, and may proceed at once to collect the same and foreclose this mortgage.

Second. The said Ben. Melter agrees that he will, upon demand of said second party, insure, for the benefit of said second part', the improvements upon the premises hereinbefore described in some good and solvent company or companies, to be approved by the said party of the second part, to the amount of at least six thousand dollars. In case of a failure so to insure, the said second party may, at his option, insure the said improvements for his own benefit, and to the same amount as aforesaid, and all premiums paid for such insurance will be repaid to said second party, or, if not repaid, shall be and become a part of the mortgage debt.

Third. The said first party further agrees that in case the said second party shall be compelled to take legal proceedings to collect the said note hereinbefore described, or any part thereof, or of the interest thereon, or to enforce the performance of any of the agreements herein
30 set forth, or to foreclose the mortgage, then the said first party will pay to the said second party a reasonable attorney's fee therefor, and in case of default, the same shall be and become a part of the mortgage debt.

Fifth. And said first party further agrees that all money paid by said second party for insurance or taxes, as hereinbefore provided, shall bear like interest with the said note from the time said money is so paid by said second party until the same shall be repaid by said first party, and all installments of interest, with said note, from the time each installment becomes due until it is paid.

Sixth. It is further agreed that said first party shall have the right to pay said debt at any time before it is due, by paying the principal and interest thereon at the rate of eight per centum per annum up to the time of such payment, and the other charges, if any, as before mentioned.

Now if said first party shall well and truly pay off and discharge
31 the said note hereinbefore mentioned, and shall well and truly perform all the conditions and agreements hereinbefore set out, then this conveyance shall be void; otherwise to remain in full force and virtue.

In testimony whereof witness our hands hereunto affixed this day and year above written.

B. MELTER.
ELIZABETH MELTER.

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me in my office, and acknowledged and delivered by B. Melter, a party thereto, to be his act and deed.

Witness my hand this 28th day of May, 1877.

CH. M. THRUSTON, *Clerk.*

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing deed was further and fully acknowledged and delivered before me in my office, by Elizabeth Melter, wife of B. Melter, a party thereto, to be her act and deed, and that I have recorded it, this and the foregoing certificate, in my said office.

32 Witness my hand this 30th day of May, 1877.

CH. M. THURSTON, *Clerk*.

Exhibit B, *is* above referred to, is as follows, viz:

EXHIBIT B.

This indenture, made and entered into this 28th day of May, 1877, by and between Ben. Melter and Elizabeth Melter, his wife, of the first part, and Masonic Savings Bank, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of one dollar cash in hand paid, have bargained, sold, and do hereby sell and convey to the party of the second part a lot of ground, with the appurtenances, in Louisville, Ky., beginning at a point 40 feet north of Breckenridge street, on the east side of Third street; thence with Third street northwardly 40 feet, and extending back eastwardly the same width, in lines parallel with Breckenridge street, 200 feet to an alley, being the same property purchased by Ben. Melter at chancery sale. (See chancery court deed book No. 9, page 528, and Jefferson County clerk's office deed
33 book 140, page 351.) To have and to hold the same unto the said second party forever, with covenant of general warranty.

But this conveyance is upon the following conditions, to wit: The said Ben. Melter has this day executed his certain promissory note, bearing even date herewith, payable to Masonic Savings Bank, or order, for the sum of six thousand dollars, payable two years after date, with interest from date at the rate of eight per centum per annum, payable semi-annually, and negotiable and payable at Masonic Savings Bank; and the said first and second parties have further entered into the following agreements, to wit:

First. That if the said Ben. Melter shall fail to pay any of the installments of interest agreed to be paid by execution of said note at the time said installments becomes due, the said second party may, at its option, treat the principal of said note as also due immediately upon such default, and may proceed at once to collect the same and to foreclose this mortgage.

Second. The said first party agrees that he will (upon demand of
34 said second party) insure, for the benefit of said second party, the improvements upon the premises hereinbefore described, in some good and solvent company or companies, to be approved by the said party of the second part, to the amount of at least $3,000. In case of a failure so to insure, the said second party may, at its option, insure the said improvements for its own benefit, and to the same amount as aforesaid, and all premiums paid for each insurance will be repaid to said second party, or, if not repaid, shall be and become a part of the mortgage debt.

Third. The said first party further agrees that in case the said second party shall be compelled to take legal proceedings to collect the said note hereinbefore described, or any part thereof, or of the interest thereon, or to

enforce the performance of any of the agreements herein set forth, or to foreclose this mortgage, then the said first party will pay to the said second party a reasonable attorney's fee therefor, and in case of default the same shall be and become a part of the mortgage debt.

35 Fourth. The said parties of the first part further agree that they will, during the term which the note herein described has to run, punctually pay taxes of every nature and kind which may be assessed upon the property therein mentioned, and in case there shall be any default in the punctual payment thereof the said party of the second part may, at its option, pay the same, and all amounts so paid shall become a debt due and additional to the debt aforesaid, and secured in the like manner by this mortgage.

Fifth. And said first parties further agree that all money paid by said second party for insurance or taxes as hereinbefore provided, shall bear like interest with the said note from the time said money is so paid by said second party until the same shall be repaid by said first party, and all installments of interest shall likewise bear the like interest with said note from the time each installment becomes due until it is paid, and the first party may pay said note and interest at any time before maturity, by paying the principal and interest to the time of payment and charges

36 as aforesaid, if any. Now, if the said first party shall well and truly pay off and discharge the said note hereinbefore mentioned, and shall well and truly perform all the conditions and agreements hereinbefore set out, then this conveyance shall be void, otherwise in full force and virtue.

In testimony whereof witness our hands hereunto affixed the same day and year as is first above written.

B. MELTER.
ELIZABETH MELTER.

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing deed was produced to me in my office and acknowledged & delivered by B. Melter, a party thereto, to be his act and deed.

Witness my hand this 28th day of May, 1877.

CHAS. M. THRUSTON, *Clerk.*

I, Ch. M. Thruston, clerk of the county court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing deed was further and fully acknowledged and delivered before me in my office

37 by Elizabeth Melter, wife of B. Melter, a party thereto, to be her act and deed.

And that I have recorded it, this, and the foregoing certificate in my said office.

Witness my hand this 30th day of May, 1877.

CH. M. THRUSTON, *Clerk.*

Upon which said amended bill the following writ of subpœna was issued, to wit:

38 *Subpœna.*

The President of the United States of America to Jacob Krieger, jr., Masonic Savings Bank, greeting:

You are commanded that you and each of you be and appear before our district court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the fourth Monday in February next, to answer a bill in equity, exhibited in said court, under the jurisdiction conferred upon it by the bankrupt laws of the United States, by Harry Stucky, assignee of Ben. Melter, bankrupt, which you shall in nowise omit under the penalty of the law. And you are hereby warned that unless you answer, plead, or demur to the aforesaid bill within ten days after the service thereof, if it be made in Jefferson County, or in fifteen days thereafter if the service be made elsewhere in the district, the said bill may be taken for confessed, or you may be proceeded against for contempt.

Witness the Hon. Bland Ballard, judge of the district court of the United States for the district of Kentucky, and the seal of our said court, at the city of Louisville, this 13 day of February, A. D. 1879, and of our Independence the 102.

AUSTIN BALLARD, *C. D. C. K. D.*,
By ROBT. H. BRENT, *his Deputy.*

T. L. Crittenden is appointed special bailiff to execute the within summons.

R. H. CRITTENDEN,
U. S. Marshal.

39 Upon which the marshal made the following return, to wit:

Return.

Executed the within summons on Jacob Krieger by delivering to him a copy, and on the Masonic Savings Bank by delivering a copy to said Krieger, president of said bank.

Feb'y 14, 1878.

R. H. CRITTENDEN, *U. S. M.*,
T. L. CRITTENDEN,
Special Bailiff.

And on another day, to wit, February 28th, A. D. 1878, came the Masonic Savings Bank, by Messrs. Russell & Helm, & W. O. & J. L. Dodd, its counsel, and filed its answer herein.

Answer of Masonic Savings Bank.

District court of the United States for the district of Kentucky.

HARRY STUCKY, ASSIGNEE, &c.,
v.
BEN. MELTER, &c.

To the honorable Bland Ballard, sole judge of said court:

The separate answer of Masonic Savings Bank to amended bill of complaint.

This defendant, for answer to so much of complainant's amended

40 bill herein as it is advised is material for it to answer unto, says:

Defendant denies that said Ben. Melter, being then or there insolvent, or in contemplation of insolvency, did, within two months before the filing of said petition against him, in conjunction with his wife, or otherwise, execute, acknowledge, or deliver to it a certain deed of mortgage, whereby said bankrupt conveyed to it the land described in said amended bill and Exhibit B, with the view to give a preference to it.

Defendant denies that said mortgage was executed, acknowledged, or delivered with a view to give a preference to this defendant, or that defendant was under any liability for said Melter. It is true said mortgage provided that it should be void on the payment of a note for six thousand dollars that day executed by said Melter to it, but no part of said debt has been paid, and said mortgage is in full force and effect.

Defendant denies that it then and there had reasonable cause to believe that said Ben. Melter was insolvent, or that it knew that said deed
41 of mortgage was made in fraud of the provisions of the laws of the United States on the subject of bankruptcies, and it denies that said mortgage is or was void, but the same is a valid subsisting lien upon the land therein described, and superior to any claim or right of complainant.

And having fully answered, it prays to be hence dismissed with its costs and for all proper relief.

RUSSELL & HELM,
W. O. & J. L. DODD, *Att'ys.*

Jacob Krieger, sr., says he is the president of the Masonic Savings Bank, and that he believes the foregoing statements and denials are true.

JACOB KRIEGER, SR.

Subscribed and sworn to before me by Jacob Krieger, sr., this 27th day of Feb'y, 1878.

[SEAL.] WM. EGELHOFF,
Notary Public, Jefferson Co., Ky.

And on the same day, to wit, February 28th, 1878, came Jacob Krieger, sr., by Messrs. Russell & Helm & W. O. & J. L. Dodd, his counsel, and filed his answer herein.

42 *Answer of J. Krieger, sr.*

In the district court of the United States for the district of Kentucky.

HARRY. STUCKY, ASSIGNEE, &C., }
vs. }
BEN. MELTER, &C. }

To the honorable Bland Ballard, sole judge of said court:

The separate answer of Jacob Krieger, sr., to the amended bill of complainant.

This defendant, for answer to so much or such parts of said amended bill as he is advised is material for him to make answer unto, says:

He denies that said Ben. Melter, being then insolvent, or in contemplation of insolvency, did, within two months before the filing of said petition

against him, in conjunction with his wife, execute, acknowledge, or deliver unto him a certain deed of mortgage, whereby said bankrupt conveyed to this defendant the real estate described in said bill and Exhibit A.

He denies that said deed of mortgage was executed, acknowledged, or delivered to him with a view to give a preference to this defendant, and denies that he was then a creditor of said bankrupt, or that he then
43 and there had a claim against said Ben. Melter, or was under liability for him.

It is true said mortgage provided that the same should be void on the payment of a certain note that day executed for six thousand dollars, but no part of said note has been paid.

He denies that he then or there had reasonable cause to believe that said Ben. Melter was insolvent, or knew that said deed of mortgage was made in fraud of the provisions of the laws of the United States on the subject of bankruptcies.

Defendant states that said mortgage was made to secure a liability created simultaneous with the execution thereof, and he has a valid and subsisting lien by reason of the same to secure the payment of said note and interest, and his lien is prior and superior to any claim of complainant or of any other person or persons.

Defendant denies that said Ben. Melter, being then or there insolvent or in contemplation of insolvency or bankruptcy, did, within three months before the filing of said petition against him in bankruptcy, did convey, transfer, or dispose of the certain portions of his property by mortgage or otherwise, with a view to prevent his said property from coming
44 to his assignee in bankruptcy, or to prevent the same from being distributed under the laws of the United States on the subject of bankruptcies, or to defeat the object of, or to impair, hinder, impede, or delay the operation or effect of, or to evade the provisions of said laws.

He denies that he had then or there reasonable cause to believe said Ben. Melter to be insolvent, or to be acting in contemplation of insolvency, or that he knew that said conveyance, assignment, or disposition of said property was made with the view alleged in said amended bill.

He denies that said mortgage is void. Defendant says that the said mortgage was made to secure a bona fide liability created at the time the mortgage was executed, and all allegations of complainant in the bill or amended bill herein to the contrary are false.

And having fully answered he prays to be hence dismissed with his costs, and for all proper relief.

RUSSELL & HELM,
W. O. & J. L. DODD, *Att'ys.*

Jacob Krieger, sr., says he believes the foregoing statements and
45 denials are true.

JACOB KRIEGER, SR.

Subscribed & sworn to before me by Jacob Krieger, sr., this 27th day of Feb'y, 1878.

[SEAL.]

WM. EGELHOFF,
Notary Public, Jefferson County, Ky.

And on the 11th day of March, A. D. 1878, came Harry Stucky, as-

signee in bankruptcy of Ben. Melter, by D. W. Armstrong, esq., his counsel, and filed his replication herein.

The replication above referred to is as follows, viz:

Replication of complainant.

In the United States district court for the district of Kentucky.

HARRY STUCKY, ASSIGNEE OF BEN. MELTER, complainant,
vs.
MASONIC SAVINGS BANK, &C., DEFENDANTS.

The replication of Harry Stucky, assignee, &c., complainant, to the separate answers of the Masonic Savings Bank and Jacob Krieger to the amended bill herein.

This repliant, saving and reserving to himself all and all manner
46 of advantage of exception to the manifold insufficiences of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

D. W. ARMSTRONG,
Att'y for Compl't.

And on the 25th day of July, A. D. 1878, came the complainant, Harry Stucky, assignee of Ben. Melter, bankrupt; came also Masonic Savings Bank and Jacob Krieger, sr., by Russell & Helm & W. O. & J. L. Dodd, their counsel, and filed an agreement herein, which is as follows, to wit:

In the district court of the United States for the district of Kentucky.

IN THE MATTER OF BEN. ME'TER, BANKRUPT. } In bankruptcy.
47

It is agreed between Harry Stucky, assignee in bankruptcy of Ben. Melter and The Masonic Savings Bank and Jacob Krieger, sr., creditors of said bankrupt, that the following objections can be made to the following debts, which have been proved against the estate of said bankrupt, to wit:

As to the debt of Brinkman & Co., $32.11, Melter holds a set-off against it to the full amount of the debt.

August Plappert, $86.35, set off by account on Melter's books by $71.40.

Julius Mendel, account of $60.00, set-off by $11.00 account on Melter's books.

Melter & Zeigler, note and account for mdse., aggregating $662.85, offset in full by rent and an account on B. Melter's books.

H. C. Murrel, debt, $163.46; set-off, $7.05.
Woodside, Green and Labaree, debt, $146.38; offset in full.
J. M. Roemle, debt, $63.75; offset, $51.35.
E. Bielstine, debt, $77.00; offset, $19.90.
Maria Korb, guardian, debt, $2,259.41; offset, $1,000.
Adam Exner, debt, $300; offset, $76.36.
M. Hartzmatz, debt, $800; fully paid.
Masonic Savings Bank, debt proved, $5,542.01; of which about $300 has since been paid.

48 One debt, $1,500, was paid by Geo. P. Doern, who afterwards proved up the $1,500 against the estate of Melter, and there is offset against the Doern debt of $166.60 on Melter's books of account.

Chas. Alexander, debt, $49.32; offset, $17.05.
Josephine Goss, admx. of M. Goss, debt, $44.80; offset, $26.31.

D. W. ARMSTRONG,
Att'y for Compl't.
RUSSELL & HELM &
DODD & DODD,
Att'ys for Mas. Sav. B. & Krieger, sr.

And on the 25th day of July, A. D. 1878, the following order was entered, to wit:

Order.

This cause came on to be heard, and the complainant, by D. W. Armstrong, att'y, read upon the hearing the depositions of Jacob Krieger, Ben. Melter, Harry Stucky, R. C. Davis, Henry Nettleroth, and J. W. Henning, and the defendants, The Masonic Savings Bank and Jacob Krieger, sr., by Russell & Helm & J. L. & W. O. Dodd, attorneys, read up the hearing the depositions of Samuel Russell, Wm. Egelhoff, S. S. Meddis, and W. W. Gardner; and thereupon, after arguing of counsel, this

49 cause *this cause* was heard and submitted, and the court, not being advised, takes time.

And on the 21st day of August, A. D. 1878, the following order of court was made:

HARRY STUCKY, ASSIGNEE,
vs.
BEN. MELTER & OTHERS.

I do not think it would be proper for me under the present circumstances to dispose of this cause in the absence of the brief of the compl't, and in the absence of any assurance that he is aware the papers have been sent to me.

Moreover, def'ts 'counsel in their brief refer to an agreement of parties, which I have been unable to find; and they frequently refer to the schedules of Melter, though they are neither among the papers before me, nor does it appear that they are a part of the case.

Let the case be set for argument on the first Tuesday after the first Monday in October.

BLAND BALLARD.

50 And on the 6th day of January, A. D. 1879, came the complainant, by D. W. Armstrong, esq., his counsel; came also the Masonic Savings Bank, by Russell & Helm, its counsel, and filed an agreement herein, which agreement is as follows, viz:

Agreement.

In the United States district court for the district of Kentucky.

HARRY STUCKY, ASSIGNEE, PLAINTIFF,
vs.
BEN. MELTER, &C., DEFENDANTS.

It is agreed between pl'ff and the Masonic Savings Bank that the schedules of Ben. Melter, in bankruptcy, may be read as evidence on the hearing of this cause.

RUSSELL & HELM,
Att'ys for Mas. Sav. Bank.
D. W. ARMSTRONG,
Att'y for Compl't.

And on the 18th day of Feb'y, A. D. 1879, the following opinion was filed, to wit:

Opinion.

HARRY STUCKY, ASS'EE OF BEN. MELTER,
vs.
BEN. MELTER, MASONIC SAVINGS BANK, JACOB KRIEGER, SR., &C.

51 In this suit the compl't, among other things, seeks to set aside two mortgages, executed by the bankrupt within two months prior to the filing of the petition in bankruptcy. Both of the mortgages were executed on the 28th day of May, 1877, one to the Masonic Savings Bank and the other to Jacob Krieger, sr., its president.

The bankrupt had been for many years prior to his bankruptcy a merchant conducting a grocery business. At the time the mortgages were given he owed the Masonic Savings Bank about $34,000. He owed the whole of this sum as principal debtor, except less than $10,000. About $22,000 of the amount was represented by several notes, on which there were securities or endorsers satisfactory to the bank. Six thousand dollars consisted of a note, which had fallen due April 2, '77, the sureties on which were not satisfactory, and which the bank had declined to renew with the same sureties. How often this note had been renewed, or whether it had been renewed at all, the testimony does not disclose; but it had been executed or renewed in the previous December, and it was
52 therefore an ordinary four months' note, such as banks usually discount.

This note lay over without any part being paid and without renewal until the 28th May, when it was renewed by the note of Melter alone, payable to Jacob Krieker, pres't of the bank, at two years, with

interest at the rate of eight per cent. per annum, payable semi-annually, and secured by one of the mortgages above mentioned.

The mortgage embraced encumbered property, and the reason why it and the note was taken to the president of the bank, and not to the bank itself, is that the officers of the bank thought (I think erroneously) the charter of the bank forbade loans on encumbered property as security, and rendered such security, if not the loan, void.

Although it was intimated that this mortgage was given upon a consideration contemporaneous with its execution, I am persuaded it was executed to Krieger in trust for the bank, and that though he may have formally endorsed the note to the bank the bank does not hold
53 him responsible or look to him for payment. This is the fair and just inference from Krieger's testimony; and I am very confident he does not wish to be understood differently.

The other mortgage was given directly to the bank to the amount of overdrafts. The bank had allowed the bankrupt to overcheck his account largely; on the 1st of Jan'y, 1877, he was overchecked nearly six thousand dollars, and though, if the bankrupt is to be believed, he was repeatedly urged to make his account good, he was unable to do so. Finally the bank, despairing of the amount being made good, on the 28th May took the bankrupt's note for $6,000, the supposed amount of the overdrafts, at two years, with interest at eight per cent., secured by this mortgage.

The evidence establishes beyond question that the bankrupt was, at the date of these mortgages, insolvent in fact as well as in the mercantile sense.

He not only had no money with which to pay his debts as they fell due, but all his property, though sold upon reasonable time, and all his available assets, were not sufficient to satisfy them. His debts then
54 amounted to about ninety thousand dollars, and all his property and means did not exceed in value $55,000.

The bank and its president were very familiar with Melter's business and condition. He had transacted nearly all of his bank business at this bank, and he testifies that its president was as well acquainted with his condition as he himself.

It may be Krieger thought that if time—long time—were given, and Melter could sell his property upon reasonable terms, enough might be realized to satisfy his debts, but he certainly knew not only that Melter had no money to pay his debts as they fell due, but that he had not paid one cent on his overdrawn account for five months, nor been able to pay or even renew his protested note which had been lying over more than a month.

Krieger also knew that Melter owned no unencumbered property, except perhaps a few groceries and a little in', and, as a reasonable man, he must have known that if his creditors became importunate his property would be, to some extent, sacrificed, and not in this event sufficient to pay his debts. He certainly could not think that Melter would ever
55 be able to pay his debts, unless his creditors should indulge him, as a merchant's creditors never indulge him, except when they act unitedly to save themselves from disaster.

The Supreme Court of the United States have repeatedly said that

"when the condition of a debtor's affairs are known to be such that precedent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him insolvent."

Merchants' National Bank vs. Cooke, 95 U. S. Rep., 346; Taof vs. Martin, 13 Wall., 40; Buchanan vs. Smith, 16 Wall., 277; Wager v. Hall, 16 Wall., 584.

I myself, sitting here, have applied this rule in hundreds of cases, and it has everywhere been recognized and enforced as the true in all of the circuit & district courts in the United States, and I should certainly not now discard it unless constrained to do so by a direct decision of the Supreme Court.

It appears from the report of the case of Taof vs. Martin that the district judge had charged the jury that the admission by the grantees that at
56 the time the transfers were made they did not believe the bankrupts unable to pay their debts in money, but were able to do so on a fair market value of their property and assets, was a direct confession of a fact which constitutes in law insolvency; that "if the bankrupt could not pay their debts in the ordinary course of business, that is in money, as they fell due, they were insolvent." This charge the Supreme Court approved.

"The rule thus laid down (says the S. C.) may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of one individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders (merchants) that the district judge was speaking.
Throughout the commercial world a merchant or banker is regarded
57 and pronounced insolvent when his paper is protested because of his inability to pay. When he cannot make good his overdrawn account after due notice, or meet his commercial paper in the ordinary course of business; he is, as merchants and bankers say, "broke."

The same judgment should not be pronounced or the same state of fact applied to a farmer, or perhaps to all trades, but to merchants or traders transacting business in commercial communities, and through banks and bankers, I think the judgment would be well nigh invariable.

When, therefore, Krieger says he did not have reasonable cause to believe Melter insolvent, he uses the term insolvent in its general and popular sense, and not in its mercantile sense; that is, not in the sense in which the term must be applied to Melter, who was a merchant transacting a large business through banks and otherwise in a large commercial city.

Counsel for the bank rely with much apparent confidence on the opinion of the supreme court in the case of Grant, ass'ee, vs. First National
Bank of Monmouth, 18 B. R., 495, as abolishing the rule above
58 announced. But it will be observed that the *trust* does not in this opinion refer to the previous cases or to the rule therein established, or intimate that it is laying down a rule different from that previously

recognized, much less does it suggest an intention to overrule the previous decisions.

This case, as I read it, announces no new rule. It simply declares that the phrase "having reasonable cause to believe such a person is insolvent" is not synonymous with the phrase "having reasonable cause to suspect such a person is insolvent." This is saying nothing more than that there is a difference between belief and suspicion. Now, I think no one will question that a suspicion of insolvency often exists, founded on few or slight facts, which never ripens into belief, or only does so on the ascertaining of further facts.

No difficulty therefore arises in reconciling the principles or tests announced in this opinion with those previously announced. The difficulty springs only from the effort to reconcile the judgment of the court on the facts stated with the previously announced rules. The facts stated
59 in the published opinion are, however, extremely meager, and I am persuaded that if all the facts appeared, which the record probably discloses, there would be little or no difficulty in harmonizing the decision with the previous cases. It will be observed that there is no statement of facts. Doubtless the judge who wrote the opinion relied on the reporter to make this, and doubtless it will appear in the regular report when the opinion shall appear in 97 U. S. Rep's.

It appears only incidentally from the present report that the bankrupt was a trader at all. It does not appear where he conducted his business whether in the country or in the city, or precisely how he conducted it; but it does appear that "the note which he received was not a regular business note," and that his manner of doing the business which it was alleged furnished the bank reasonable cause to believe that he was insolvent was the same that it always had been.

The facts of this case do, in some respects, bear a resemblance to some of the facts in the present case, but the difference is very wide.

First. The Masonic Savings Bank possessed an acquaintance with
60 & knowledge of Melter's business, liabilities, and means, which the the First National Bank of Monmouth did not have of Miller's.

Second. Neither was a merchant conducting his entire business in a large commercial city. Miller was a trader, doing, it may be inferred, much of his business in the country, where promptness is neither expected nor demanded.

Third. The note which Melter received and secured was regular business paper; that which Miller received was not.

Fourth. The note of Melter had been lying over more than a month. He was not able either to pay or renew it sureties satisfactory to the bank.

For aught that appears the note of Miller was renewed at maturity in the regular course of business.

Fifth. Melter was asked to pay his note, but could not. It does not appear that Miller was asked to pay his.

Sixth. Melter was repeatedly requested to make good his overdrawn account, but could not. It does not appear that Miller was ever asked to make his good.

Seventh. Melter did not renew his note on the usual bank time, but renewed not only his own note, but gave the first note for the amount
61 of overdraft at two years. Miller, so far as appears, renewed on the usual time.

There is some attempt on the bank to explain the giving of this long time to Melter, by the suggestion that this bank is a savings bank, and was therefore seeking permanent investments, but the facts do not warrant this explanation. It is evident that the bank was only seeking investments; that in fact it wanted & demanded payment, and the only reason it gave the long time of two years was because it could not obtain better terms; that is, terms which gave more promise of payment.

I have not overlooked the fact that the bank seems to have allowed Melter to further overdraw after the execution of the mortgages, but I more than suspect that this overdrawing was only nominal or apparent, and that the bank was in some way secured. If this be not so, how did happen that it refused to pay his check for the small amount of $125.60 given C. Henry Finck?

It appears that Melter, within six weeks after the date of these mortgages made an assignment as in case of solvency to Krieger & by his advice
62 for the benefit of the creditors, and that Krieger himself says, answer 97, that between the date of the mortgages and the assignment he did not learn any new facts about his (Melter's) standing.

In view of all the facts I am satisfied that Melter when he executed the two mortgages which are assailed was 'solvent both in the popular and mercantile sense.

I am also satisfied that the bank and its officers had then reasonable cause to believe him insolvent in the mercantile sense, that is, the sense in which the term insolvency is used when applied to merchants.

It follows as a legal consequence that the bank knew that the mortgages were made in fraud, that is, legal fraud of the provisions of the bankruptcy act.

In conclusion, I have to say that if the Supreme Court in the case of Grant vs. First National Bank, means to change the rule announced in Toof vs. Martin and solemnly reannounced in three subsequent cases, it has not said so, and that I shall adhere to the old rule until it shall be distinctly abrogated. I don't, however, believe that there was any
63 purpose to change it. Let an order be entered annulling the mortgages and giving to compl't his costs. Let leave be given the bank to prove the debts mentioned in the mortgages as a general creditor.

I am not sure that in this proceeding a decree can be entered for the sale of all the mortgaged property mentioned in the original bill, but if the case is properly prepared to this end, especially if the mortgagees consent, such a decree may be entered.

And on the 18th day of February, A. D. 1879, the following decree was entered to wit:

Decree.

District court of the United States for the district of Kentucky.

HARRY STUCKY, ASSIGNEE OF BEN. MELTER,
vs.
BEN. MELTER, MASONIC SAVINGS BANK, & JACOB KRIEGER, SR.

This cause coming on to be heard, complainant read the depositions of

Ben. Melter, two depositions of Jacob Krieger, sr., the depositions of R. C. Davis, Harry Stucky, J. W. Henning, Henry Nettleroth; and
64 the defendants Masonic Savings Bank and Jacob Kreiger, sr., read the following depositions, viz: Samuel Russell, William Egelhoff, S. S. Meddis, and W. W. Gardner; and the following agreements were also read, viz, one filed July 25th, 1878; one filed January 5th, 1879, and the schedules in bankruptcy of Ben. Melter were read; and after reading the pleadings and exhibits therewith filed, and upon argument of counsel the cause was submitted; and the court being sufficiently advised, delivered a written opinion herein, which was filed; and in conformity with said opinion—

It is ordered, adjudged, and decreed that the mortgage made by Ben. Melter to defendant The Masonic Savings Bank, on the 28th day of May, 1877, be, and the same is hereby, set aside, annulled, and held for naught.

It is further considered that complainant recover of said defendant his costs herein expended, as against said bank, for which he may have execution.

It is further considered that said defendant may prove its said debt, to secure which said mortgage was given, as an unsecured debt against the estate of Ben. Melter, bankrupt.

2. It is further ordered, adjudged, and decreed that the mortgage
65 made by said Ben. Melter to defendant Jacob Krieger, sr., on the 28th day of May, 1877, be, and the same is hereby, set aside, annulled, and held for naught.

It is further considered that complainant recover of said defendant his costs herein expended as against said Jacob Krieger, sr., for which he may have execution.

It is further considered that said defendant or the Masonic Savings Bank may prove the said debt, to secure which said mortgage was given, as an unsecured debt against the estate of Ben. Melter, bankrupt; and the said defendants, Masonic Savings Bank and Jacob Krieger, sr., each except to the foregoing decree and pray an appeal to the circuit court of the United States for the district of Kentucky, which is granted them and each of them.

And on the 20th day of February, A. D. 1879, came the complainant by P. A. Gaertner & D. W. Armstrong, esqs., his counsel; came also Russell & Helm & Dodd & Dodd, att'ys for Masonic Savings Bank and Jacob Krieger, sr., and filed an agreement herein, which is as follows:

Agreement.

In the district court of the United States for the district of Kentucky.

66 HARRY STUCKY, ASSIGNEE, &C., }
v.
BEN. MELTER AND OTHERS. }

The clerk is directed to copy all the record in this case except as hereinafter stated.

The plaintiff and the defendants The Masonic Savings Bank and Ja-

cob Krieger, sr., in order to save any unnecessary costs in copying the record, mutually agree—

First. That by the charter of The Masonic Savings Bank, said institution has a lien on the stock owned by any stockholder for the payment of any debt due and owing it by said stockholder, before any other creditor.

Second. That said institution was forbidden by its charter to loan money except on unencumbered real estate worth at least double the amount loaned.

(Said bank charter need not be copied.)

Third. That the schedules in bankruptcy made up by the bankrupt and his lawyer show that the secured debts of said bankrupt amount to $44,366, and the unsecured debt to $23,525.

Fourth. That said schedules show an estimated value of $93,300.00 on the assets of said bankrupt.

67

RUSSELL & HELM,
DODD & DODD,
Att'ys for Masonic Savings Bank and Jacob Krieger, Sr.
P. A. GAERTNER &
D. W. ARMSTRONG,
Att'ys for Complainant.

Order.

And on the 21st day of February, A. D. 1879, came the defendants The Masonic Savings Bank and Jacob Krieger, sr., and offered to execute an appeal bond herein, and named as surety Geo. Werner, who, upon personal examination by the court, is approved as good and sufficient. And thereupon the said Masonic Savings Bank and Jacob Krieger, sr., principals, and the said Geo. Werner, surety, executed and delivered their joint and several appeal bonds in the sum of $500; which seems to the court to be in due form, and is approved.

The following is the bond referred to in the foregoing order:

District court of the United States, district of Kentucky.

HARRY STUCKY, ASSIGNEE OF BEN. MELTER,
vs.
BEN. MELTER ET AL.

Know all men by these presents that we, The Masonic Savings
68 Bank and Jacob Krieger, sr., principals, and Geo. Werner, surety, are held and firmly bound unto Harry Stucky, assignee, in the sum of five hundred dollars, to be paid to the said assignee, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 21st day of February, A. D. 1879.

Whereas the above-named The Masonic Savings Bank & Jacob Krieger, sr., hath prosecuted an appeal to the circuit court of the United States to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the conditions of this obligation is such that if the above-named The Masonic Savings Bank & Jacob Krieger, sr., shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void;
69 otherwise the same shall be and remain in full force and virtue.

THE MASONIC SAVINGS BANK, [SEAL.]
By JACOB KRIEGER, *its Pres't.*
JACOB KRIEGER, SR.
GEORGE WERNER.

Sealed and delivered in presence of—
ROBERT H. BRENT.

Approved Feb'y 21st, 1879.

And on the 22nd day of February, A. D. 1879, the following notices of appeal were filed, to wit:

Notice of appeal.

District court of the United States for the district of Kentucky.

HARRY STUCKY, ASSIGNEE OF BEN. MELTER,
vs.
MASONIC SAVINGS BANK AND JACOB KRIEGER, sr. } Notice.

AT LOUISVILLE, *February 20th*, 1879.

To Harry Stucky, assignee of Ben. Melter, complainant in above suit:

You are hereby notified that we claim an appeal from the judgment of the district court of the United States for the district of Kentucky, made entered on the 18th day of February, 1879, setting aside, annulling, and holding for naught the mortgages made May 28th, 1877, to the
70 Masonic Savings Bank and to Jacob Krieger, sr., to the circuit court of the United States for the district of Kentucky, next to be holden at Louisville, in said district.

MASONIC SAVINGS BANK &
JACOB KRIEGER, SR.,
By RUSSELL, HELM & DODD,
Att'ys.

Upon which the marshal made the following return, viz:

Return.

Executed this notice on the within named Harry Stucky, assignee of Ben. Melter, by delivering to him a copy thereof this 20th Feb'y, 1879.

R. H. CRITTENDEN, *U. S. M.*,
By J. L. FAIRLEIGH, *D. M.*

Notice of appeal to A. B.

District court of the United States for the district of Kentucky.

HARRY STUCKY, ASS'EE OF BEN. MELTER,
vs.
BEN. MELTER, MASONIC SAVINGS BANK, JACOB KRIEGER, SR.

AT LOUISVILLE, *Feb'y 20th*, 1879.

To Austin Ballard, clerk of the district court of the United States for the district of Kentucky, at Louisville, Kentucky:

71 You are hereby notified that we claim an appeal from the judgment of the district court of the United States for the district of Kentucky, made and entered on the 18th day of Feb'y, 1879, setting aside, annulling, and holding for naught the mortgages made May 28th, 1877, to the Masonic Savings Bank and to Jacob Krieger, sr., to the circuit court of the United States for the district of Kentucky, next to be holden at Louisville, in said district.

MASONIC SAVINGS BANK, and
JACOB KRIEGER, SR.,
By RUSSELL & HELM & DODD,
Att'ys.

Upon which the marshal made the following return, viz:

Executed this notice on Austin Ballard, clerk of the United States district court, at Louisville, Ky., by delivering him a copy thereof this 20th day of Feb'y, 1879.

R. H. CRITTENDEN, *U. S. M.*,
By J. L. FAIRLEIGH, *D. M.*

The cause coming on to be heard the complainant read in evidence the following depositions, viz:

The deposition of Ben. Melter, taken on the 14th day of June, 1878,
72 at the office of D. W. Armstrong, esq., at Louisville, county of Jefferson and State of Kentucky, to be read in evidence on behalf of the plaintiff in an action between H. Stucky, ass'ee, &c., plaintiff, and the Masonic Savings Bank, defendant, now pending in the U. S. district court, both parties by attorney being present:

Dep'on—Ben. Melter.

BEN. MELTER, being duly sworn and examined by Mr. Armstrong, as attorney for plaintiff, deposes as follows:

Qu't. 1. State your name, place of residence, and whether you are the bankrupt in this case.

A. Ben. Melter; I live near the corner of Third and Breckenridge, two doors from the corner; I am forty-one years of age; I am the bankrupt in this case.

Qu't. 2. How did it come that you executed on the 28th of May, 1877,

the mortgages that are in controversy in this case—one to Jacob Krieger, sr., and one to the Masonic Savings Bank?

A. Mr. Krieger asked me for it at the counter. He threatened to sue me, and that is why I gave him the mortgage.

Qu't. 3. Did you, at the time those mortgages were executed, obtain any money from Jacob Krieger, sr., or the Masonic Savings Bank?

A. Not a cent.

Qu't. 4. Did you have any arrangement or understanding with
73 Mr. Krieger at that time to furnish you any sum of money on the execution of those mortgages?

A. I did not. It was the understanding when he asked me for the mortgages to include what I owed the bank and the check what was laying over.

Qu't. 5. How long before the mortgages were actually executed was the first discussion or suggestion of that matter between you and Krieger? How long was the first talk before the mortgages were made?

A. About three days.

Qu'. 6. Do you remember the day of the month on which the execution of the mortgage was first suggested?

A. The mortgage was given on the 28th, & I think it was on the 25th when the first suggestion was made.

Qu'. 7. By whom was that made?

A. By Mr. Krieger.

Qu'. 8. Did you execute those mortgages willingly?

A. No, not exactly.

Qu'. 9. State what your feeling about that was.

A. My feeling at the time was that I would get out without giving any mortgages, because I had a great deal of money invested in ice, and I offered some of my houses for sale—that is, the one Mr. Miller
74 lives in, and I told Mr. Krieger the time before that I thought I could pay him the money, but in the mean time Mr. Krieger got sort of anxious about the thing. He came out twice on Sundays; he came out once on a week day and he says to me: "Mr. Melter, this thing has to be settled." He stood at my bar and took a drink and a cigar—he stopped there. I said: "Mr. Krieger, I am doing all that I can to settle this; I want to sell my ice; you know that I have got the ice, and I want to sell my property to get out of this debt." I think it was during April or May, say about the 25th of May, so far as I can recollect, I stepped into the bank; previous to that when I came to the bank he always asked me for that account, to settle the matter, and previous to that when he came out to my house. This day I came to the bank—I think it was the 25th —and Mr. Krieger called me; I think there was a great many people in the bank, which is always the case; I came there about ten or eleven o'clock. I think Mr. Krieger saw me. He was sitting inside at his desk on a chair.

He said: "Mr. Melter, before you go I want to see you." I
75 said "All right." I stepped inside the bank after I got through. I had some kind of business to do, I don't know what it was; when I stepped in and sat down alongside of him, Mr. Krieger told me, "Mr. Melter, this story has been long enough, now;" says he, "You promised from day to day to pay, and settle this matter," and, says he, "It is only a few days now, and we are going to bring suit against you." It

struck me—I thought Krieger was a friend of mine—it struck me, and I said, "Krieger, what have I to do?" Says I, "I cannot sell my property at the present time, which I tried to do; I cannot sell my ice; what shall I do?" He said, "Give me a mortgage." That is the first that I ever heard about a mortgage; I said, "What mortgage do you want?" He commenced setting figures down. He says, "You owe Mr. Coldeway $7,000.00 mortgage;" I said, "Yes, I do." Says he, "You owe $5,000 to Adam Exner, on the corner of Third & Breckenridge;" I said, "Yes, sir." Says he, "You don't owe anything on the house you are living in." I said, "No, sir." He said something about endorsing for somebody. He knew a great deal of my affairs. I endorsed for Philip Doerm; and he said, "Don't do it any more." That is the remark that he
76 made; I endorsed for Philip Doerm, $300; I says, "What do you want now?" I could not help myself, I was in trouble and did not want to be sued; and I asked Krieger, "What do you want now?" He says, "Give me half of it of the house corner of Third and Breckenridge, and give me the other half where you live in." I said, "All right." It was either—I could not say exactly, but that was either Friday or Saturday, I think it was either Friday or Saturday. I went home, and didn't talk to my wife about it at the time; so, on Sunday morning, about nine o'clock, Mr. Kreiger came to my house, and he came into my bar-room and took a drink, and he says, "Mr. Melter, I want them papers." I said, "What papers do you want?" He said, "I want the papers from your house on the corner of Third and Breckenridge, and I want the papers from your house where you live in." That was the papers. I bought the ground from T. L. Jefferson, and bought the other from T. L. Nicholson. I had to give him the papers. I took all my papers out and gave him those two deeds. That was on Sunday morning; and he went off.
77 On the 28th day—I think it was on Monday—I don't know; but on the 28th the mortgage was signed.

Int. 10. Are you positive in your recollection that there never had been any talk about your giving those mortgages prior to the 25th of May?

A. Yes, sir.

Int. 11. Did you ever at any time get any money from Mr. Krieger, or the Masonic Savings Bank, under the promise to execute a mortgage to secure him?

A. I did not.

Int. 12. Did you have any paper in the bank overdue at the time this mortgage was made?

A. Yes, sir.

Int. 13. How much?

A. I believe it amounted to $6,000; I could not exactly say.

Int. 14. Who was on that paper?

A. Joseph Isert & Henry Urschel.

Int. 15. How long had that paper been overdue?

A. I could not tell exactly; I believe it must have been some month or six weeks; I don't know exactly, and cannot tell.

Int. 16. Did you try to renew that paper with Mr. Krieger?

A. He told me that I should try to get different names on it,
78 but I did not know where to go to. Of course, Marcus was endorsing for me, but I did not know what I could do. He said, "Get other names on it, & I will take the paper."

Int. 17. Did he say whether he would take the paper with Urschel and Isert on it?

A. No, sir; he would not.

Int. 18. Did you overdraw your account at the bank at the time, under a promise to give Mr. Krieger or the bank a mortgage to secure the overdraft?

A. No, sir.

Int. 19. Did you get any money from them, in any way at all?

A. No, sir.

Int. 20. How many times did Mr. Krieger call on you for the settlement of your indebtedness before the execution of the mortgage?

A. At least about a dozen times; I don't know exactly, but at least about that.

Int. 21. How often did he say anything about suing you?

A. Only once.

Int. 22. When was that?

A. That was the time that we talked about the mortgage.

Int. 23. Did he give you any reason why the thing had to be fixed up?

79 A. No, sir; he said the directors of the bank would not let it go any longer, and he was bound to do something about it. He told me that previous to that time—half a dozen times—that the directors of the bank were kicking about it, and they would not allow it to go any longer.

Int. 24. Are you certain that your promise to Mr. Krieger of these mortgages was not made in January or February, 1877?

A. Yes, sir; I am certain.

Int. 25. Did you attend to business during those months?

A. I did not.

Int. 26. What was the reason of that?

A. I was sick in bed.

Int. 27. Have Joseph Isert and Henry Urschel, who were your endorsers in the bank, failed and become insolvent?

A. Yes, sir; after me.

Int. 28. About how long after you?

A. I could not say exactly; I think about two or three weeks; I don't know exactly; I could not tell the date.

Int. 29. What was the market price of stock in the Masonic Savings Bank in May or June, 1877?

A. So far as I understand, it was 105. That is what they always told me. It might be little less, but I believe it was between 103 and 105.

80 Int. 30. Do you know what these two mortgages were given to represent—what debt?

A. Yes, sir; I know it was for this note and overdraft.

Int. 31. One mortgage was given for the note on which Isert and Urschel were security?

A. Yes, sir.

Int. 32. And the other was given for the overdraft?

A. Yes, sir.

Int. 33. Was there any cash advanced to you on either mortgage or the faith of either, or on the faith that you would execute them?

A. Not a copper cent.

Int. 34. Did you execute this mortgage to secure the Isert and Urschel note before or after you had attempted to renew that note?

A. Well, he insisted on me to renew the note; that is, he wanted to get other names on it. He said that he did not want to take them names any more, and so I thought I could make arrangements to sell some property or sell some ice to pay them. I could not, and I could not ask Marcus for any more, because he was an endorser on some of it; so I had to let it go. I did not have any other friend to endorse that
81 much for me, so I had to let it go until I gave the mortgage which he asked for.

The further taking of this deposition was thereupon adjourned until Saturday, June 22d, at three o'clock p. m.

CHAS. A. GRAHAM,
Examiner, J. C.

JUNE 28TH, 1878.

Met pursuant to adjournment.

Cross-examination by Mr. HELM:

Cr. 1. When were you sick; what time during 1877 were you sick?

A. January and February.

Cr. 2. Were you confined to your bed?

A. Yes, sir; most of the time, not all of the time. I was out once.

Cr. 3. Did you send for Mr. Krieger while you were sick?

A. I don't know if I did.

Cr. 4. Did you not send for Mr. Krieger and ask him to allow you to overdraw your account, and that you would make it all right?

A. I don't know it if I did.

Cr. 5. Do you know that you did not?

82 A. I don't know. I know that Mr. Krieger came there once to visit me. I don't know that I sent for him; I don't know if I did.

Cr. 6. On the occasion Mr. Krieger came did you not then ask him to allow you to overdraw your account in the bank, telling him that you would make it all right with him as soon as you got out?

A. No, sir; I did not.

Cr. 7. Are you certain of that?

A. Yes, sir.

Cr. 8. That you never asked him to allow you to overdraw your account?

A. Not at that time. I did occasionally, but not at that time.

Cr. 9. What day of the month was it Mr. Krieger came to your house and asked you for your papers, deeds, and one thing and another, with the view to getting up the mortgage?

A. I believe it was on the 26th. I know that it was on Sunday. I know that.

Cr. 10. How long prior to that time had the question of your giving mortgages been discussed?

A. About a day or two. I believe about a day or two days. I believe it was on the 25th.

83 Cr. 11. Might it not have been as early as the 23rd?

A. Don't ask me that. I tell you what is the time. I don't answer that.

Cr. 12. Might it not have been as early as the 23rd?

A. No, sir.

Cr. 13. Didn't you tell Mr. Egelhoff several months prior to that time that you would give a mortgage?

A. Not that I know of, because Mr. Egelhoff is not like Mr. Krieger, not that I know of.

Cr. 14. Do you know that you didn't tell him?

A. I don't know, if I did; I say, not that I know of. All contracts that I had were with Krieger, most of them.

Cr. 15. You stated in your examination-in-chief that you did not want to give mortgages, because you hoped to get through without mortgages?

A. I did.

Cr. 16. Did you not at the time of these mortgages, to wit, on the 28th of May, 1877, consider yourself worth three dollars for every dollar you owed?

A. No, sir; I don't know; I could not tell that. Mr. Krieger knew more about it than I did.

84 Cr. 17. Did you not consider yourself abundantly solvent at that time?

A. I considered it this way: If I could sell my property in the way that I wanted to, I considered myself solvent. I did not know otherwise. You knew where the property was. I did not know what the property would be sold for. You know how times is.

Cr. 18. Did you not report to Mr. Krieger at that time that you had property sufficient to pay three dollars for every dollar that you owed?

A. I did not; I had enough property. I told him I wanted to sell my property; sell some of my goods, ice stock, and whisky, to pay my debts. That is all I said. I would sell everything to satisfy him.

Cr. 19. Do you think Mr. Krieger would have allowed you to overdraw your account if you had represented to him that you were not abundantly solvent?

A. I don't think he would on all accounts, what I would draw.

Cr. 20. Please explain that last answer, I do not understand it.

85 A. Because I don't think he would let me draw on that account.

Cr. 21. You have said that you did not get any cash money at the time these mortgages were executed?

A. I did not.

Cr. 22. Will you please produce and file all your checks for the month of May, 1877?

A. I don't file nothing. I haven't got any checks. I never had any account for two months.

Cr. 23. Are you in the habit of destroying your checks?

A. No, sir.

Cr. 24. Were you in the habit of preserving your checks?

A. Yes, sir; I didn't get none for the last two months that I kept the account; I only kept a little account.

Cr. 25. Did you not, about the 30th of May, check on the bank for $443.77, and the same day another check for $50.00, and on the same day a check for $43.00?

A. I don't know.

Cr. 26. Did you not, on the 31st of May, 1877, check on the same bank for $100, and again for $141.32, and again for $4.20 and three of these last checks on the 31st of May, 1877?

A. I don't recollect it.

Cr. 27. Did Mr. Krieger tell you that you must give a mortgage on Sunday?

A. No, sir; not on Sunday.

86 Cr. 28. What day of the week was it that he told you that you must give the mortgage the first time?

A. I believe it was on Saturday. I believe the 25th of May. I don't know exactly. I believe it was on Saturday or Friday, the 25th of May.

Cr. 29. Even after these mortgages were given did not Mr. Krieger allow you to overdraw your account at the bank?

A. Not much; he did not.

Cr. 30. Well, how much?

A. I came in one day and told him that I had some money to pay on real estate—$1,000—and that I was bound to have it, and if I could not get it I would go somewhere else. He said, "I believe that I had better give it to you." I paid that to Mr. Bate on the 13th of June for Mrs. Korb's property. I paid it that day.

Cr. 31. Was that the only overdraft you made after those mortgages?

A. I don't know if it was. This was on the 13th, and on the 15th he refused my check. I gave a check on the 13th, and it was dated the 15th, and he refused my check, and that is where all the trouble came from.

Cr. 32. What do you mean by that it is that that all the trouble came?

87 A. In the first place, C. Henry Finck went all round town saying that my check was not paid in the Masonic Savings Bank, and he went around afterwards in the court-house asking if I did not make an assignment already. Such rumors came altogether from the refusal of that check.

Cr. 33. Did you know at the time you drew the check that you had no money in the bank to pay the check?

A. I thought my credit was good. I did not know that I had enough to pay. Maybe I would pay some in some time, and maybe they went there before banking hours. I generally deposited at eleven o'clock in the morning, or maybe sometimes after dinner; I don't know how that was.

Cr. 34. At that time you considered yourself perfectly able to pay all your debts, didn't you?

A. No, I did not. I didn't say that, but I considered that debt was good enough. I thought I could get out if times were reasonable and sell some of my property, and I would have come out all right.

Cr. 35. Didn't the Masonic Savings Bank cash your check on the German National Bank for $375 on the 20th of June, 1877?

88 A. I don't know it they did. Maybe they did. I didn't know at the time that that was paid. I can prove that. It was in bankruptcy.

Cr. 36. Didn't the bank pay you the money for that check?

A. No, sir.
Cr. 37. The Masonic Savings Bank?
A. No, sir; I did not.
Cr. 38. You are certain of that?
A. I told you so.
Cr. 39. Didn't that check pay some of your notes?
A. What notes?
Cr. 40. I am asking you.
A. I want to know what notes.
Cr. 41. I don't know.
A. I don't know neither.
Cr. 42. Do you say it did not pay any of your notes?
A. I don't say that, but I ask what notes.
Cr. 43. Can you state positively that that check did not go to your account either in paying some note or notes on which you were bound, or did you get the money, or has it been put to your credit on the books?

A. I believe, so far as I know, that the credit was given on my
89 books, but I don't know any further. I don't know anything about the cask; I never got the cash for it. I know that, but I believe, so far as I can recollect, that the credit was given on the books for that amount, although I found out afterwards.

Cr. 44. Didn't the Masonic Savings Bank on the 5th of June, 1877, loan you $1,500.00 on your stock in that bank?
A. I expect that they did; they could not get over that—to loan $1,500.00 on $2,000.00 of stock. They loaned me $1,500.00, and they could not prevent that.
Cr. 45. How long had you been in business in this city—grocery business?
A. Since 1862.
Cr. 46. What capital did you have at the time you commenced the business?
A. Well, I think I had about $600.
Cr. 47. At the time you went into bankruptcy you owned a double store on the corner of Third and Breckenridge, didn't you?
A. Yes, sir.
Cr. 48. Two dwelling houses on Third st., north of your store?
A. Yes, sir.
Cr. 49. You owned two dwelling houses more on Breckenridge?

A. Yes, sir.
90 Cr. 50. You owned a double store front on the corner of Second & Breckenridge?
A. Yes, sir.
Cr. 51. You owned a three story building on the corner of First & Gray?
A. Not three story.
Cr. 52. What sort of a house was it?
A. 2½ story.
Cr. 53. You owned some property on Dumesneil street?
A. I did.
Cr. 54. On which there was an ice-house?
A. Yes, sir; two of them.

Cr. 55. You had a good deal of ice?

A. Sometimes we had; when it was filled.

Cr. 56. You owned some property on Main street?

A. I did.

Cr. 57. You owned some property on Main street between Preston & Jackson that you bought at chancery sale?

A. I did.

Cr. 58. Then you had a stock of groceries in your store, corner of Third and Breckenridge, did you not?

A. I did.

Cr. 59. About the time you went into bankruptcy how much was all that property worth, in your judgment?

A. Well, I could not tell that. I know what it cost me. I
91 could not tell what it was worth.

Cr. 60. Come as near as you can to it.

A. I expect about $99,000; between that and $100,000. That will figure up pretty near what it cost me. I figured it up some time ago.

Cr. 61. What was the amount of your debts at the time you went into bankruptcy?

A. I don't know. Krieger knows better than I do. I knew afterwards, but not at that time. I found it out afterwards.

Cr. 62. How much were they?

A. I think they have got it on the record. I don't know exactly. I know Krieger told me one day, on the 4th of July, it was about $64,000. That was on the 4th of July, 1877. He told me before I made the assignment it was $64,000. He told me and Major Davis in the bank together. I did not know at that time that it was that high.

Cr. 63. Can you tell me about what you gave for that property that you had?

A. I went over the whole list of the property. I can tell you what I gave for it.

Cr. 64. What did you give for your double store on the corner of Third and Breckenridge; what did it cost?

92 A. $16,000.00.

Cr. 65. Does that include your store-house in the rear?

A. No, sir.

Cr. 66. How much did that cost?

A. It cost $2,000.

Cr. 67. What were the two dwelling houses in the rear worth; that is, what did they cost you?

A. $8,000.00 and some odd dollars. There was some extra work on it. I could not tell you exactly; say $9,000.00.

Cr. 68. All those buildings that I have just named are on the lot 40x200?

A. No, sir.

Cr. 69. What was the size of the lot?

A. They were on a lot about 40x120 feet deep.

Cr. 70. What did the two dwelling houses on Third street, north of your store, cost you?

A. They cost about $12,000 apiece; that is, when they ran through. You must understand that the rear of the houses were cut off. There

only 145 feet deep in the place of 200 feet before. That makes the difference.

Cr. 71. How much did you pay for the ground on the corner of Third and Breckenridge, where your store-house is located?

93 A. $110 a foot.

Cr. 72. 40 feet front?

A. Yes, sir.

Cr. 73. Have you included that in your estimate of the cost of the store-house?

A. Of course I did—what the whole thing cost. When I am estimating property I put in the cost of the ground.

Cr. 74. What did your property on the corner of Second and Breckenridge cost you—those double houses?

A. They cost me about $20,000, I reckon. I could not say exactly, but about that.

Cr. 74. Does that include the ground?

A. I think so.

Cr. 75. What did the ground cost you?

A. $142 a foot.

Cr. 76. How many feet?

A. 47¾ or ½, something like that. I got a deed for it—about $21,000—that is as near as I can come to it.

Cr. 77. What did the property on the corner of First and Gray cost you?

A. I could not tell exactly; about $11,000, I believe. I could not tell exactly; I have not got the papers here.

Cr. 78. What did your property on Damesneil street cost you?

94 A. Cost me $600.

Cr. 79. How much did the two ice-houses on that property cost you?

A. They cost me about—I could not tell exactly. Do you mean the ice and all in them?

Cr. 80. No, sir; the ice-houses.

A. They cost me about $1,100; between that and 1,000. I could not tell exactly.

Cr. 81. How much did that Main street property cost you, on which you had not paid all the purchase-money?

A. You know what I bought it for—cost me $5,500, I believe.

Cr. 82. How much did you owe on it at the time you went into bankruptcy?

A. Owed all of it.

Cr. 83. At the time you gave these mortgages, on the 28th of May, 1877, what was your ice on hand worth, in your judgment, at that time?

A. That is hard to tell what it was worth.

Cr. 84. What did you consider it worth at that time?

A. I cannot tell what it was worth. I know what I had in it.

Cr. 85. What did you have in it? Did you consider it worth at that time $3,000?

95 A. I don't know if I did. I can tell how many tons I had, and I can prove it by the man that put it in there. At that time

you could not consider it at any price. I thought it was worth a good deal.

Cr. 86. How much?

A. I don't know; I thought I had about 125 tons of ice in this ice-house. That is what I thought, but I could not consider what it was worth.

Cr. 87. What did you consider your stock of groceries worth at the time you gave these mortgages?

A. I could not tell exactly; I never took stock.

Cr. 88. I don't want to know exactly; I want to know about.

A. Worth about five or six thousand dollars. I never took stock, because I never had a partner.

Cr. 89. What did you consider your whisky worth?

A. I considered that in the stock. I never have no outside business. Sometimes I had—a good many times—I had whisky in bond, but not at that time.

Cr. 90. You are the same man who gave a deposition in the case of Stucky, assignee, against Exner?

A. I believe so.

Cr. 91. I see you answer here, in response to a question about
96 what all your property cost you, that is, the real estate of which you have spoken, you answer that it cost $98,000, as near as you can come to it?

A. Yes, sir.

Cr. 92. $98,400 you had on the paper?

A. Yes, sir.

Cr. 93. Then it cost you a good deal to repair it after that?

A. May be it did; I don't know; but I put that down to a low figure. They gave me time to figure it. If you give me time to figure it, I will give it the same way.

Cr. 94. You stated that you had about $600 capital when you began business in 1862. Did you accumulate all this property since then?

A. I did.

Cr. 95. How much did you consider that you sold of your stock in a year?

A. I don't know; you will have to ask somebody else. I never had any account. You can find out some years in the United States court where I put in my account and paid my revenue.

Cr. 96. Have you an idea how much it was?

A. I don't know. If you want to know anything about it you can go there.

Cr. 97. I am asking you.

A. No, sir; I never bothered myself.

97 Cr. 98. Do you know about how much you made a year; how much profit?

A. I do not. I never had any partner, and I never figured it up. I never made any calculation, and never took any stock, except twice when I sold out.

Cr. 99. Would be safe in saying that you cleared $10,000.00 a year?

A. I told you that I did not know. I don't say nothing; you can consider yourself; I don't know.

Cr. 100. I want to get it approximately.

A. You can get it in that way; I don't know.

Cr. 101. Can you safely say that you made a profit of $1,000 a year?

A. I don't say that. I say that I made more than $1,000. I don't say how much.

Cr. 102. Can you say that you made more than $2,000?

A. I don't say what I made. I don't want to answer the question, because I never kept any books.

Cr. 103. I want to get at your best judgment. Can you say that you made more than $3,000?

98 A. I cannot say; I don't know anything about what I made, I never had any partner, except my wife; she was satisfied, and I never had any other partners, and never had any one to enquire about the stock. May be one year I made $5,000, and another year $1,000. How can you ask a man what he don't know?

Cr. 104. You evidently made enough to accumulate a handsome fortune.

A. What do you call a handsome fortune?

Cr. 105. All this property.

A. You take the debts off and there won't be much left. I know that I made some money, otherwise I would not have that property, still it went down so that I am stuck in the mud and I cannot tell. You can see what revenue I paid; I don't recollect.

Cr. 106. When did you commence buying the property you have spoken of?

A. The first I bought in 1865, from T. L. Jefferson, and paid him $110 a foot, 40x200, $4,400.

Cr. 107. You bought the balance of your property between 1865 and 1876?

A. Not all of it; most I did.

Cr. 108. When did you buy the rest of it; since 1876?

99 A. I don't know exactly. I believe the Main street property was bought; may be it was 1876; I cannot tell; may be it was 1877; I don't know exactly the date. I would not testify to that. It don't amount to anything nohow; because it was not paid; but the others was bought between that time.

Cr. 109. All your have you have made yourself; you did not inherit it?

A. I made it all myself; that is, my wife made it.

Cr. 110. At the time these mortgages were executed to the bank and Mr. Krieger, what were the amount of the liens that then existed against your property?

A. Krieger knows better than I do; I don't know; Krieger knows more about it than I do.

Cr. 111. I see your answer in the deposition given in the Exner case, that may be you sold $100,000 a year, and may be you did not?

A. I could not tell exactly; I told you that a little while ago; I could not tell exactly.

Cr. 112. You did not fix this amount?

A. I tell you I don't know exactly, and told you that before.

Cr. 113. Was if about $100,000?

100 A. I don't tell you that. I don't tell any amount at all. I told you what I know, and if you want to have any more you must

look for it; may be I sold $5,000 and may be I sold more than that; I could not tell exactly.

Cr. 114. You were examined by whom, in the case of Stucky, assignee, against Exner?

A. I don't know. I believe Gaertner and Armstrong.

Cr. 115. Mr. Gaertner and Armstrong represented Mr. Exner, did they?

A. I believe so; I don't know anything.

Cr. 116. They cross-examined you in this deposition given in the Exner case?

A. Yes, sir.

Cr. 117. I see they asked this question—question 41, on cross-examination, "Did you sell as many as $100,000.00 of goods a year?" And to that you answer, "May be and may be not. May be sometimes I sold them, but I could not tell exactly."

A. I did not tell you what I sold there.

Cr. 118. You make the same answer here?

A. I cannot make any more answer.

Cr. 119. You adopt that answer?

A. I don't know if I will.

Cr. 120. Is that answer wrong that I have just read you?

101 A. No, sir; it is not wrong.

Cr. 121. Is it right?

A. I don't know, I will see about. It is not wrong. I don't know—I say between that—I cannot state any amount; I told you that in my deposition; I don't state that amount that I sold $100,000.

Cr. 122. I don't want you to state exactly how much you sold. I am after an approximation.

A. I don't state to you any amount; I just say it might and it might not.

Cr. 123. I want you to simply judge about how much you sold?

A. I told you in your deposition that I could not, and I told it in that deposition that I could not; may be it was between that.

Cr. 124. Between what?

A. Between $25,000 and $100,000; I don't state any amount.

Cr. 125. That is a pretty broad margin?

A. Well, let it be as it will.

Cr. 126. Can you not come nearer than to say between $25,000 and $100,000?

A. I could not tell. There might be times that I did. You can see it in the United States books, but I could not recollect it, and I don't

102 deny it. There might be times that I did. You can refer to the books of the United States, and you can see what I paid tax. I never kept any books. I always was for myself. I never had any partner. I paid my revenue as quick as anybody. May be it was $100,000. I cannot say really the amount of it. Although I swore to it in United States taxes, but those taxes I have not got. At that time I kept account of it.

Cr. 127. Do you know about what per cent. profit you always aimed to make?

A. Yes, sir; I generally averaged about ten per cent.; that is my average.

Cr. 128. Will you produce all your checks that you have, so that we may examine and see how many you have in the month of May, 1877?

A. No, sir.

Cr. 129. You state in this deposition that you did not want to give a mortgage to Mr. Krieger or the Masonic Savings Bank, because you hoped to get through without mortgaging. Did you mean by that that you hoped to get through and have your property saved without having any mortgages on it?

A. I could not get through; I told you that I wanted to sell some of it to pay my debts; I could not save it all.

103 Cr. 130. At the time you gave these mortgages what did you then think your debts amounted to?

A. I don't know, sir.

Cr. 131. About how much?

A. I don't know, sir.

Cr. 132. Have you no idea?

A. I don't know, sir.

Cr. 133. What statement did you make to Mr. Krieger as to the amount of debts you owed for merchandize?

A. I did not make any statement; Krieger made it $64,000 after the assignment; I did not make any statement of it; I didn't know; I could not tell.

Cr. 134. I will ask you about what was the amount of your unsecured debts at the time you made your assignment?

A. I don't recollect.

Cr. 135. What do you think it was at that time?

A. I don't know; I don't recollect.

Cr. 136. Cannot you come something near to it?

A. No, sir; I cannot.

Cr. 137. Was it $5,000?

A. I don't know.

Cr. 138. Was it $10,000?

A. I don't know, sir.

Cr. 139. Was it $500?

A. I don't know.

104 Cr. 140. Was it $100?

A. I don't know.

Cr. 141. Was it $1.00.

A. I don't know; I know that it was more than $1.00; but I don't know the amount it was; I know that it was more than $500; but I don't know the amount, and that is the reason that I don't want to tell.

Cr. 142. How did Mr. Krieger come to know the amount of your debts better than you did, unless you had given them to him?

A. I never gave them to him, as close as he knows it.

Cr. 143. Do you, before making any financial transaction whatever, always go to Mr. Krieger and tell him that you expected to make such a transaction, and the amount that would be involved in the transaction?

A. Not always.

Cr. 144. How did he know better than you your financial condition?

A. Because he enquired.

Cr. 145. Didn't you give him the information?

A. Not always; he inquired outside.

Cr. 146. Do you mean to say that he could learn more of your financial condition from others than even you, yourself, *you*?

A. I think he did.

105 Cr. 147. Has that been your mode of transacting business ever since you commenced it—not to keep any account of your business affairs?

A. No, sir.

Cr. 148. When did you fall into that habit?

A. I don't know.

Cr. 149. When you gave your deposition in the Exner case, did not Mr. Gaertner and Mr. Armstrong become very indignant at you and threatened to prosecute you for false swearing?

A. No, sir; they never did.

Cr. 150. What did they say to you about it? What did they say to you about the manner in which you testified in that deposition?

A. They never said anything against me in that deposition, not that I know of.

Cr. 151. Didn't they say anything to you?

A. Not in the deposition.

Cr. 152. After the deposition was over, didn't they say something to you about your deposition?

A. Yes, sir, I believe they did; they said that I had the privilege to look it over and make everything perfectly right, if there was anything wrong, before signing my name.

Cr. 153. Was that all they said?

106 A. They said if the thing would not be right; that is, if they proved it, of course it might make some trouble; that is the whole of it.

Cr. 154. What sort of trouble did they say you might possibly get into?

A. I don't know; that is all they told me.

Cr. 155. Unless you made certain corrections you might get into trouble?

A. I never made any alterations; only one thing. I did not need to make any alteration. I will sign my name to that to-night.

Cr. 156. Did you sign the Exner deposition?

A. I don't think ; I can sign it any time; I will sign yours to-night if you want it, so far as that is concerned, if you want to bluff. If you think it not right I will sign it. I think it is right, and I will sign it in that way.

Cr. 157. Did not Mr. Armstrong threaten you about your last deposition?

A. No, sir, not that I know of. Which one?

Cr. 158. The one you gave in the Exner case.

A. What do you mean by that?

Cr. 159. You have just stated that he told you that you had better make a certain correction or you might get into trouble.

A. He just said that I could take the paper. There was only one item that I corrected. I never corrected anything else—about a note or check.

107 Cr. 160. Did any one else threaten you about the Exner deposition?

A. They did not; only said I had better put the thing correct or I might get some trouble; that is the only thing. They never threatened me anything about it. That is the only thing said after the deposition was taken. I was willing to sign it then and I am willing to sign it to-day if they want it.

Redirect examination by Mr. ARMSTRONG:

Int. 1. Did you file the papers you had in your hand as requested by Mr. Helm, a while ago?

A. Yes, sir.

Int. 2. What does the memorandum on the small paper mean?

A. It is about a check.

Int. 3. What check was that; explain the memorandum?

A. It was a check that I gave on May, 1877, to Mr. Bessman, the 5th of May, for $52.38, which the Masonic Savings Bank refused to pay.

Int. 4. Was that you' check on the Masonic Savings Bank?

A. Yes, sir.

Int. 5. Did you have to take that check up by paying Bessman the cash for it?

A. I gave that check to Billy Fredon in the Second street market.

108 I bought goods from him. He asked me for a check for $52.38 on the 5th of May, on the Masonic Savings Bank. When I came the market next time he said to me, "Mr. Melter, here is your check back." I was astonished at the time, because I was under the impression that I had money there, and I said to him, "Billy, give me the check and I will bring you the money in the morning." I said "it will be all right in the morning;" and on the 7th of May, 1877, I brought him at the Second street market $52.38 in cash, which I can prove to-day, and prove that the check was refused. This money was entered on Bissman's book, and I went down and saw the book. The $52.38 was paid in cash, but the check was refused for that amount in the Masonic Savings Bank.

Int. 6. Did you state in your cross-examination to-day about the check you had given C. Henry Finck?

A. Yes, sir.

Int. 7. Explain that transaction and give us the date.

A. I gave C. Henry Finck the check on the 13th June, 1877.

Int. 8. For how much?

A. $125.60.

Int. 9. On what bank?

A. On the Masonic Savings Bank.

109 Int. 10. Was that check paid?

A. No, sir, it was not.

Int. 11. What effect did the refusal of that check have on your credit?

(Question objected to.)

A. Good deal.

(Answer objected to.)

Int. 12. Did you make any promise to Mr. Krieger with regard to the repayment of money at the time you overdrew the $1,000.00 to pay on the Third street real estate?

A. I told him that I would make it up in a few days.

Int. 13. What real estate did you pay that on?

A. On Korb's estate.

Int. 14. How was it paid?

A. In the chancery court. You can find it filed with the accounts on the 13th June.

Int. 15. Describe that real estate, where it is situated?

A. It is situated 100 feet from Breckenridge street, and runs 200 feet to an alley, more or less; not quite, because there is some cut off.

Int. 16. Is it on the west side of Third street north of Beckenridge?

110 A. Yes, sir; my house is on the northeast corner, and three doors from that is my house which I bought; and I had to pay that at the time that I got this money, and I paid it the same day.

Int. 17. At the time you gave these mortgages, did you know whether you would sell your property for enough to pay your debts?

A. No, sir; I did not. I tried to; I offered a couple of houses for sale, and I thought at one time that I had a man to buy it, but he backed out again and I could not sell it; I tried to sell my ice and could not sell it.

Int. 18. When Mr. Krieger, on the 4th of July, estimated your indebtedness at sixty-odd thousand dollars, do you know how much he considered your property worth over that amount?

A. I do not.

Int. 19. What did he say about the value of your estate?

A. I don't know. He said something, but I don't remember. He said that that was the liability. He knew more about it than I did; I don't know that I owed that much at the time.

111 STATE OF KENTUCKY,
Jefferson County:

I, Chas. A. Graham, examiner, do certify that the foregoing deposition of Ben. Melter was taken pursuant to agreement before me, and was read to his in my presence at the time and place, and in the action mentioned in the caption, the said witness having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and statement reduced to writing by me in his presence, both parties, by attorney, being present. The signature of said witness being waived by consent.

Given under my hand this 22nd day of June, 1878.

CHAS. A. GRAHAM,
Examiner.

The deposition of R. C. Davis, taken on the 9th day of July, 1878, at the office of Harry Stucky (assignee), court place, bet. Fifth and Sixth sts., Louisville, Ky., to be read as evidence in behalf of the complain-

112 ant in an action between H. Stucky, (assignee of Ben. Melter) complainant, and Ben. Melter, Masonic Savings Bank, and Jacob Krieger, defendants, pending in the United States district court for the district of Kentucky.

Deposition of R. C. Davis.

Deponent being of lawful age, and first duly sworn, deposes and says:

By D. W. ARMSTRONG:

State your name, place of residence, and occupation.

A. R. C. Davis; residence, Louisville, Ky.; occupation, practicing attorney.

Q. Do you know the bankrupt, Ben. Melter; if so, how long have you known him?

A. I have known him since 1870 or 1871.

Q. Have you at any time acted as his attorney?

A. I have been since 1871; I think it was.

Q. In the course of your relations with him as attorney, have you had opportunity or have you become familiar with the estate?

A. Yes, sir.

Q. Has Melter at any time (within the period since you have known him and had knowledge of his business) owned any property on
113 Main street except the piece of property bought of the McBrides' estate?

A. No, sir; I never knew of his owning any other property but the McBride property.

Q. Did he ever pay anything on that property?

A. Never to my knowledge has he paid a cent on it. I know he did not.

Q. Where did he buy, and how?

A. At chancery sale, by the marshal of the chancery court.

Q. Did you represent him in that matter?

A. I did, sir.

Q. Is that property now part of the estate of Melter in bankruptcy?

A. It is not; the property was sold again under an order of the chancery court.

(Objected to.)

Q. Within what time; before or since the bankruptcy?

A. Since his bankruptcy.

Q. Has Melter since you have known him, or at any time within the last four years, owned any property on Third and Oak streets, in Louisville, Ky.

A. No, sir; don't think he has; I never heard of his owning any property on Third and Oak streets.

(Objected to.)

114 Q. You know of the estate that Melter owned?

A. I believe I have known of the estate, or the greater portion of the estate, owned in Louisville within the past four or five years by Melter?

Q. He could not have owned any property on Third and Oak streets without your knowing it?

A. No, sir.

(Objected to.)

Q. Has Melter at any time within your knowledge owned property on Third and Ormsby avenue?

A. Yes, sir.

Q. How long since he owned that?

A. My impression is he sold that property to Imorde in 1874 or in 1875.

Q. You were his attorney in that matter?

A. I didn't make the deed between him and Imorde; have heard him and Imorde speak of it.

(Objected to.)

Q. How far back?

A. It was before Melter's bankruptcy; prior to his bankruptcy; some time prior; and I might say further, I have seen the deed of record myself.

115 Q. Were you acting as attorney of Melter during and summer of 1877?

A. Yes, sir.

Q. Did you, in the course of your duties as attorney, come in contact with Jacob Krieger, sr.?

A. Yes, sir.

Q. Was there a conversation held with him in regard to the condition of Melter's estate?

A. Yes, sir; we conversed together.

Q. Do you remember whether it was in the month of July?

A. I think it was; yes, sir; when we held a consultation about Melter's condition.

Q. State where and how you held such consultation?

A. Consulted with Krieger several times in regard to Melter's condition, during the summer of 1877. I remember to have had an engagement with Melter and Mr. Krieger, either in the latter part of June or early part of July, 1877, to take into consideration his (Melter's) condition at that time. The appointment was not met by Mr. Krieger, and I made an engagement to meet on the 4th of July, at his office. We met there on the morning of the 4th of July, 1877, Melter, Krieger, and

116 myself, and had a consultation with regard to Melter's condition.

Q. Did Krieger express any opinion as to Melter's financial condition?

A. Krieger, myself, and Melter were making an estimate of the amount of assets and the amount of liabilities of Melter at that time, the amount of assets he had and the amount of liabilities he owed at that time. Kireger had a statement there, or list he had made, of the debts he had become cognizant of, and of Melter's liability; he also took an estimate *of* at that time. I am not sure whether he had the estimate made up before or after we met of what he considered Melter's assets at that time. He estimated his liabilities somewhere between $60,000 and $65,000, or $67,000; I am not sure; but it was over $60,000, and between that and $65,000 to $67,000; I am not sure of the exact amount; and his assets, taking Melter's statement, or his own idea of the matter, he estimated his assets would run somewhere between (I think it was) $73,000 and $80,000. In that he included an estimate of the stock of groceries of Melter, and of some

117 ice; and his indebtedness, that is the amount of debts due Melter's estate; it was somewhere in that neighborhood.

Q. Did Krieger express any opinion of Melter's condition at that time?

A. The conversation was in regard to saving Melter and getting him out

of his trouble. I don't remember distinctly what expression he gave, but the impression left on my mind was that he thought Melter was in a pretty bad way.

(Ans. objected to.)

Q. Will you give or repeat, as nearly as you are able, what Krieger said on that subject?

A. I don't know that I can give Krieger's language on that occasion. There was a good deal of the conversation pro and con in regard to Melter's condition, and the probability of being able to save him from bankruptcy, and of making his estate pay out.

Q. Did Krieger express any opinion of the probability of making the estate pay out?

A. He thought it was a matter of some doubt as to his ability to make the estate pay out.

118 Q. What knowledge of Melter's affairs and what familiarity did Krieger have at that time?

A. He had an estimate as I said before, and spoke of one or two matters that I had not estimated myself in Melter's indebtedness, although I had been figuring on the matter. My resources of getting a knowledge of Melter's condition were mainly from himself, that is his indebtedness, and a good many debts he left out; Krieger spoke of one or two, but I don't remember whose debts. He spoke of one or two that Melter had not spoken of.

Q. Did Krieger appear to have a familiarity with Melter's business and estate?

A. He had a greater familiarity with the amount of the indebtedness of Melter that I did, because he spoke of one or two debts. I am sure he spoke of one debt that I had not myself.

Q. Had you, prior to that meeting (July 4th), had any conversation with Krieger in regard to Melter's condition and the amount of his debts—how far back?

119 A. The fact is, Melter had been, or his condition had been, discussed for perhaps a week, may be ten days prior to that time; may be longer, I could not tell. We discussed it so much during that period that I don't know how long prior to the 4th it was. I had one engagement with him. I think it was during the latter part of June, or early part of July. I had an engagement to meet Krieger. I was with Melter, but he had failed to come, and we made this appointment for the 4th of July. The matter of Melter's condition had been discussed by Krieger and me prior—I don't know how long prior—but some days prior to the 4th of July.

Q. Did Krieger become the assignee of Melter in the deed for the benefit of the creditors?

A. Yes, sir.

Q. When?

A. It was somewhere between the 18th and 25th of July; the exact date I don't know, but somewhere between the 18th and 25th of July, 1877, I think.

Cross-examined by W. O. DODD:

120 Q. On the fourth of July, at the time of the meeting you referred to, what was Melter's idea of his condition?

A. Melter represented himself as being able to pay his whole indebtedness.

Q. And have a surplus?

A. I am not sure but what he said he would have a surplus. I know that he represented that he was able to pay his whole indebtedness *ef* the property could be sold at anything like its value.

Q. Dollar for dollar?

A. And with a surplus over.

Q. What is your best recollection as to whether or not he would have a surplus?

A. I heard him talk so much that I am not sure it occurred in that consultation. I heard him say to parties (but am not sure whether he said so or not to Krieger) that he was hard up, but that if his property *but that if his property* could be sold for its value he would pay every dollar and have a surplus over.

Q. Did he indicate how much surplus?

A. I don't know that he did. Melter himself, in my judgment, never knew how much his indebtedness was.

(Objected to.)

121 He never gave me, as his attorney, a statement of his indebtedness that was accurate.

Q. Did he give you a statement of his assets?

A. He never gave me a written statement, but I have pretty much all his assets.

Q. When you spoke in your direct examination about the land which he owned, or did not own, you didn't speak from facts derived from Melter, but from your own knowledge?

A. It was from my own knowledge, and from my knowledge which was derived from what I had ascertained through Melter in regard to his ownership of the property. I know the property he owned here, all the real estate in Louisville, at the time he went into the bankruptcy.

Q. When you say he didn't own property on the corner of Third and Oak streets, did you know he didn't own any there?

A. I never heard of his owning any there on Third and Oak streets. I never knew of it and never heard so.

Q. You know he owned property on Third and Ormsby avenue?

A. Yes, sir; I did.

Q. How much further out is Third and Ormsby avenue than Third and Oak?

122 A. I believe but one square, just one square south.

Q. It is not a fact that there is much confusion among citizens well acquainted with the streets of Louisville, in speaking of streets out so far as Ormsby avenue, and in giving the names of the streets?

A. I could not answer that question, for I don't know; I know all the streets pretty much out there.

Q. You are a member of the board of common council?

A. Yes, sir.

Q. In that capacity, might you not have become well acquainted with streets out there?

A. I knew the streets out in that part of the town before becoming a member of the board of common council, but my knowledge of that

locality might have grown out of the fact that I used to visit Melter's when I was out there.

Q. How long before the 4th of July do you think it was, when you first conferred about Melter's condition?

A. I had several conversations with Krieger in regard to Melter's
123 condition prior to the fourth of July, but exactly how long before that time I could not state.

Q. Any great while?

A. It could not have been a great length of time prior to that time. It was between the making of the mortgage and the fourth of July that I had a conversation with Krieger.

Q. The mortgage of Mr. Krieger & Masonic Savings Bank?

A. It was subsequent to that time; I am pretty sure now.

Q. Didn't Melter on the fourth of July estimate his liabilities less and his assets more than Krieger did?

A. He did, sir.

Q. At that interview, you say Krieger estimated that Melter's assets would realize somewhere about $73,000 to $81,000.00?

A. I think it about $81,000.00, which was the limit he fixed upon it; upon Melter's statement in regard to it; I think he said it would run somewhere between $73,000 and $81,000, somewhere between those two estimates. He fixed his indebtedness; my impression is he got it as high as $67.000, I think.

Q. Taking every liability that could be rendered up, he could
124 not make it greater than $67,000 that Krieger had made, between $60,000 and $67,000?

Q. The minimum of assets or minimum amount that could be realized of the assets were fixed at about $73,000?

A. I think so.

Redirect examination by D. W. ARMSTRONG:

In estimating on one basis, there was a surplus of $6,000; did you include anything as compensation of Mrs. Melter for her dower or right of homestead?

A. I don't think we did.

Q. Was Ben. Melter at that time a married man?

A. Yes, sir.

Q. He was a housekeeper with a family?

A. Yes, sir.

Q. Did he live on any of this real estate?

A. He lived in the second house north from the corner of Breckenridge and Third street, on the east side of the street.

Q. In the opinion of , you say Melter expressed that his assets would pay out dollar for dollar. Was not that Ben. Melters's idea—
125 that is, if his property would sell for a fair value, was not that Melter's idea?

(Objected to.)

A. Yes, sir; he thought that it would, and he went on to state what the property cost him.

Q. And in that event, if he sold out, that it would bring dollar for dollar.

A. Yes, sir.

By GAERTNER:

Q. You stated that this property, on the corner of Third and Ormsby avenue, was sold by Melter in 1875. Did Melter pretend at any of the meetings with Krieger that the property belonged to him last summer?

A. Krieger didn't estimate that property in it. Krieger was cognizant of the fact that Melter had sold the property, because he held a mortgage of Imordi on the property; held the mortgage for some $6,000 or $8,000.

Q. Were you consulted by Melter at any time in reference to the execution by him of this mortgage to the bank and to Krieger?

A. No, sir; didn't know it had been executed until after the thing was done; never had any idea of the thing. He never had
126 consulted with me at all on the subject; never knew it until afterwards.

(Objected to.)

Q. Did Krieger have a conversation with you after having succeeded in getting the mortgage?

A. I had a conversation with Krieger in regard to Melter's condition, and with regard to making Melter a further loan on his property.

Q. That was some time between the mortgage was given and the 4th of July?

A. Yes, sir.

Q. Was the statement of Melter's indebtedness that Krieger had on the 4th of July a detailed statement?

(Objected to.)

A. Well, he had a good many; I don't know what you call a detailed statement. He had a statement of the amount owing Melter's creditors.

Q. Merchandize and bank paper?

A. Yes, sir.

Q. You don't know how he got them?

A. No; but I know he had them.

Q. You don't know long he had them?

A. No, sir.

127 Q. He seemed to be more familiar with the indebtedness than you did?

A. Yes, sir.

Q. And seemed perfectly familiar with the property at the interview you had?

A. Yes, sir; knew of his real estate.

(Objected to.)

Q. Knew of his grocery and ice?

A. Yes, sir; Melter spoke of the ice.

Q. Krieger was very well informed about this mortgage on the property at that time—liens of Western Bank and the Exner mortgage and the Korb lien?

A. He knew of the Western Bank and Exner mortgage and of the Korb lien.

A. Yes, sir.

Q. Knew of vendor's lien and the other—Dumesniel and Hunter, Market street property?

A. Yes, sir.

Q. So far as you know, Melter never with'eld any information on the subject of his liabilities and indebtedness, so far as he was able to give it to Krieger, so far as you yourself knew?

A. So far as I know, he did not withhold any such information, though I don't know what interviews may have been had privately.

128 Q. Those you were present at?

A. Don't think he consulted me about the matter.

Q. You didn't observe any prevarication on the part of Melter?

A. That is a question I could not answer.

Q. So far as you were conversant with his affairs you didn't think he withheld any information about his liabilities and assets?

A. I could not say that he did. If he prevaricated through ignorance, and left out the amount of his indebtedness or assets, I could not say. I don't think myself that he knew of many of the debts against him until they came up. He was in a condition that he didn't know exactly how many debts he did owe.

Recross-examined by W. O. DODD:

Q. Which Exner mortgage did you refer to?

A. The mortgage for $9,000 in 1877.

A. Yes, sir.

Q. Were you consulted by Melter about that mortgage?

A. I am not sure whether I was or not. At one time I thought I had been consulted, but I believe (after reflecting on the matter) I

129 came to the conclusion that I was mistaken.

Q. Did Exner purpose to relinquish on the mortgage provided the Masonic Savings Bank would relinquish theirs?

A. I don't know; I am not sure if he didn't. I have no recollection of it—have no recollection of his proposition to relinquish it.

Q. The Exner mortgage you refer to, is it the one Gaertner and Armstrong represented in the contest between Exner and the assignee?

A. Yes, sir; that is one of the mortgages I refer to.

Q. Did you ever hear Melter say anything about what Gaertner and Armstrong said to him about the way he swore in that case?

A. Melter did say something to me about Armstrong and Gaertner telling him to be mighty careful how he swore, or something to that effect.

Q. Is that all he told you; didn't they threaten him?

A. I am not sure. My recollection is that they told him to be very careful how he swore about the matter, lest he might get himself in trouble.

Signature waived by consent of parties.

130 STATE OF KENTUCKY,
County of Jefferson:

I, H. D. Dougherty, examiner for Jefferson County, certify that the foregoing deposition of R. C. Davis was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving it; that it was taken down in short-hand by me in his presence and subsequently transcribed into long-hand, and that by consent of parties the signature of witness thereto was waived. Complainant was present by attorneys, Messrs. P. A. Gaertner and D. W. Armstrong, and in person.

Defendants were present by attorneys, Messrs. W. O. Dodd & J. P. Helm, but not in person.

Given under my hand this 12th day of July, 1878.

H. D. DOUGHERTY,
Examiner, J. C., Ky.

Deposition of H. Stucky.

The deposition of Harry Stucky, taken on the 9th day of July, at the office of deponent, Court Place bet. Fifth and Sixth st's, Louisville, Ky., to be read as evidence in behalf of the complainant in an action between Harry Stucky (assignee of Ben. Melter), complainant, and Ben. Melter, Masonic Savings Bank, and Jacob Krieger, sr., defendants, pending in the United States district court for the district of Kentucky.

131

Deponent being of lawful age, and first duly sworn, deposes and says:

By D. W. ARMSTRONG:

Q. State your name and place of residence, and whether or not you are the complainant in this case and assignee in bankruptcy of Ben. Melter.

A. My name is H. Stucky; am the assignee of Melter; and was so appointed at a meeting of creditors held September 4th, 1877.

Q. Please state what estate has come to your hands as the assignee of Melter; and what you regard as reasonable value of the estate?

A. Forty feet of ground on Dumesniel street, between Twelfth and Thirteenth, $47\frac{3}{12}$ by 200, on the southwest corner of second and Breckenridge. The real estate as shown in the memorandum filed by J. W. Henning, this day taken, embraces all of the real estate that come to my hands as assignee.

132

Q. What other assets came to your hands besides the real estate shown in that paper?

A. Some accounts.

Q. Of what amount or value collected?

A. I don't remember exactly, but think the amount of collections and rents, after the necessary disbursements, to be about $2,000 cash.

Q. What was the character of disbursements you made?

A. Paying taxes.

Q. Anything on payment of debts?

A. No, sir; just payment of taxes, and some for preferred debts of $50.00, and under.

Q. What personal property besides notes and accounts came to your hands?

A. There was a stock of groceries in the hands of Krieger as assignee of Melter under the State law; that has never come into my hands.

Q. What was the stock sold for?

A. I think $3,500.

Q. Is that the entire ~~stock~~ Estate of Melter as far as known to you?

A. Yes, sir.

Q. What was its value?

A. I suppose about $50,000.

133

Q. What is the amount of debts proved against the estate of Melter?

A. The amount of unsecured debts proven are about $52,000.00.

Q. The amount of incumbrances on his real estate is what?

A. About forty thousand dollars.

Q. Name the persons holding those incumbrances and the amount of each.

A. Masonic Savings Bank, $6,000, dated 30 May, 1877; Adam Exner, $9,072.66, dated June 23, 1877; Adam Exner, $5,000.00, dated October 2, 1874; J. Krieger, sr., $6,000, May 30, 1877; A. F. Coldway, $7,000; don't know the date of that, but was made a couple of years ago. Ben. Tabben lien notes $725.00; Ben. Tabben again, lien, $2,900, on another piece of property; H. Hurter lien note, $350; vendor's lien in suit of Korb vs. Korb, in Louisville chancery court of about $2,300 odd, amounting to upwards of $40,000, including interest.

Q. Do you know the property on Main street called the McBride property which Melter bought?

A. I know where it is located.

Q. Had Melter paid anything of the purchase money on that property?

134 A. No, sir, he had not.

Q. What course did you, as assignee, take with regard to that purchase?

A. I disregarded it as any part of the estate.

Q. Why did you do that?

A. There was some defect in the title property he purchased at suit in chancery and executed his note, but as I understand that he failed to execute his sale bonds.

Q. Is that the only property on Main street to the estate of Melter?

A. That is all I know of.

Q. You didn't regard it that there was any profit to the estate of Melter in taking that property at the price he bid on it?

A. No, sir.

Cross-examination by Mr. DODD:

Q. You are an assignee in bankruptcy, and a member of the board of common council?

A. Yes, sir.

Redirect by D. W. ARMSTRONG:

Q. What experience have you had in the handling of real estate

135 in the city of Louisville, Ky., during the last two or three years? (Objected to as direct.)

A. During the past eighteen months I have sold out real estate at public auction.

Q. You consider yourself a judge of the value of real estate in this city?

(Objected to.)

A. It is a hard matter to form an opinion of the value of real estate.

Q. As compared with other business men of the city, what did you regard, or what did you think with regard to your competency to form an opinion in that respect?

A. I don't consider myself an expert in the valuing of real estate; but I have some confidence in my own judgment as to its value.

(Objected to on the ground of witness not being an expert.)

Signature waived by consent of parties.

136 STATE OF KENTUCKY,
County of Jefferson:

I, H. D. Dougherty, examiner for Jefferson County, certify that the foregoing deposition of Harry Stucky was taken by me at the time and place stated in the caption; that said witness was duly sworn before giving it; that it was taken down in short-hand by me in his presence, and subsequently transcribed into long-hand; and that by consent of parties the signature of witness thereto was waived. Complainant was present by attorneys, Messrs. P. A. Gaertner & D. W. Armstrong, and in person. Defendants were present by attorneys, Messrs. W. O. Dodd and J. P. Helm, but not in person.

Given under my hand this 13' day of July, 1878.

H. D. DOUGHERTY,
Exam'r, Jeff. Co., Ky.

Examiner's fee, $2.00, paid by complainant, H. Stucky.
July 13, 1878.

H. D. DOUGHERTY, *Ex'r.*

137 The deposition of J. W. Henning, taken on the 9 day of July, 1878, at the office of deponent, on Jefferson str., between Fourth & Fifth streets, Louisville, Ky., to be read as evidence in behalf of the complainant in an action between H. Stucky, assignee of Ben. Melter, complainant, and Ben. Melter, Masonic Savings Bank, and Jacob Krieger, sr,, defendants, pending in the United States district court for the district of Kentucky.

Deponent being of lawful age, and first duly sworn, deposes and says:

By P. A. GAERTNER:

Q. State your name, residence, and occupation.

A. J. W. Henning. I am a professional real estate agent and surveyor, and have been engaged as such for thirty odd years.

Q. Were you acquainted with the values of real estate in Louisville, Kentucky, in the spring of 1877.

A. I have always had my opinion of the value of real estate in Louisville, Kentucky.

138 Q. Had you any occasion, in the spring or summer of 1877, to give an expression of your opinion as to the value of Ben. Melter's real estate?

A. In the latter part of July or the first of August, 1877, I, in conjunction with Nettleroth, examined the estate of Ben. Melter, and made up a list of its probable value, according to our best judgment. A copy of that opinion is written out on a piece yellow paper, which I file, and make part of this deposition. That is all I know about it. It is signed by my name.

Q. The values given in that paper were the values you and Nettleroth fixed on the property in the latter part of July, 1877?

A. Yes, sir.

Q. In the latter part of May, 1877, that property was worth about the same?

A. Yes, sir.

Q. Nettleroth concurred with you in that opinion?

A. Yes, sir; and signed that paper.

139 Q. He also, at that time, was a real estate agent?

A. I don't know. He was a surveyor and civil engineer.

Q. Please state how you happened to make that valuation.

A. I was called on by some party in interest, I suppose.

Q. Do you remember who it was?

A. Mr. Krieger, of the Masonic Savings Bank.

By W. O. DODD:

Q. The estimate, I suppose, is merely an opinion?

A. Yes, sir.

Q. You didn't pretend to do anything more?

A. I can't give anything else.

Signature waived by consent of parties.
Examiner's fee, $2.00.

STATE OF KENTUCKY,
Jefferson County:

I, H. D. Dougherty, examiner for Jefferson County, certify that the foregoing deposition of J. W. Henning was taken before me at the
140 time and place stated in the caption; that said witness was duly sworn before giving it; that it was taken down in short-hand by me in his presence, and subsequently transcribed into long-hand, and that by consent of parties the signature of witness thereto was waived. Complainant was present by attorneys, Messrs. P. A. Gaertner & D. W. Armstrong, and in person. Defendants were present by their attorneys, Messrs. W. O. Dodd and J. P. Helm, but not in person.

Given under my hand this 12 day of July, 1878.

H. D. DOUGHERTY,
Exam'r, Jeff. Co., Ky.

The exhibit above referred to is in words and figures as follows, viz:

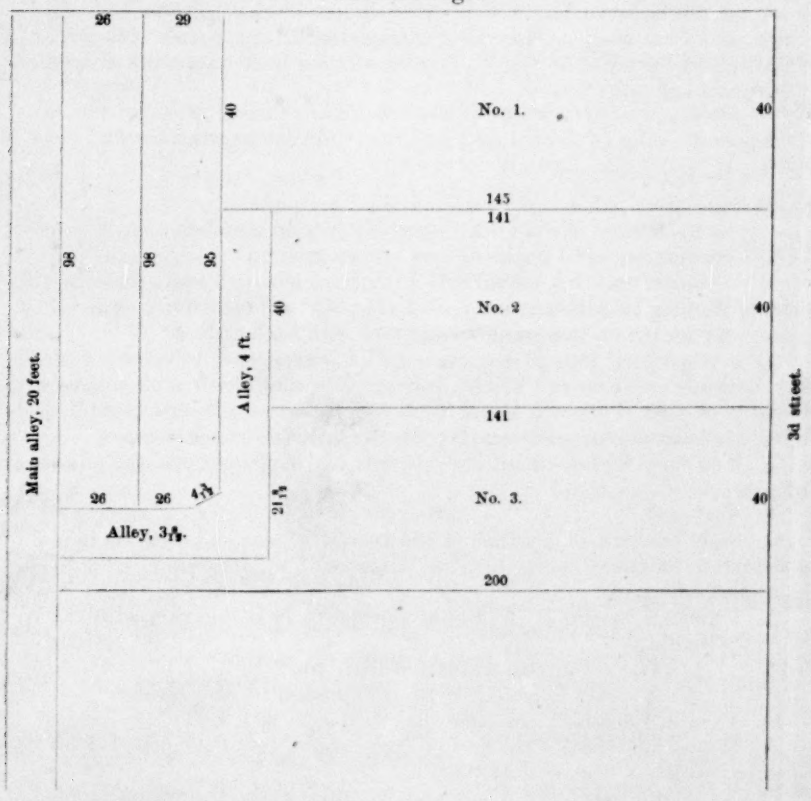
EXHIBIT.

Valuation of the real estate of Ben. Melter, as of the 30 day of May, 1877.

1st. Stone house on the southwest corner of First & Gray street, with lot 23x140 feet..... $8,000

2d. Double dwelling house on the southwest corner of Breckenridge & 2d streets, on lot 47½x200..... $12,000

141 3d. Lot on 3d & Breckenridge streets, divided into 5 lots, as p'r plat:



No. 1, with store-house	$10,000
No. 2, with dwelling house	$5,000
No. 3, with dwelling house	$5,000
No. 4, with dwelling house	$4,000
No. 5, with dwelling house	$4,000

4th. A lot of 30x100 feet on the north side of Market str., 30 feet west of 21st, $750.00; and 95x60 feet west side of 21st, 100 feet north of Market $950

5th. Lot on Dumesnil & 12 str's, with ice-house, 40x156¼ feet... $600

142 The foregoing valuations were on careful examination of the property August 2, 1877, and do not, in my judgment, vary materially from the values as of 30th of May, 1877.

J. W. HENNING.

The deposition of Henry Nettleroth, taken on the 11 day of July, 1878, at the law office of D. W. Armstrong, corner Fourth & Jefferson str's, Louisville, Ky., to be read as evidence in behalf of the complainant in an action between Harry Stucky, assignee of Ben. Melter, complainant, and Ben. Melter, Masonic Savings Bank, and Jacob Krieger, sr., defendants, pending in the United States district court for the district of Kentucky.

Deponent being of lawful age, and first duly sworn, deposes and says:

By GAERTNER:

Q. State your name, age, residence, and occupation.

A. Henry Nettleroth; age, 43; residence, Jefferson County;
143 occupation, civil engineer and surveyor.

Q. Were you acquainted with the values of real estate in the city of Louisville during the year 1877; and, if you were, state what were your means of becoming acquainted with such values?

A. I considered myself acquainted with the property value of such. My business as surveyor brings me in close connection with real estate. Outside of that I have a good deal of property under my control, and have studied the real estate market for the last ten or eleven years.

Q. You have had considerable property under your control for purposes of sale and disposition?

A. Yes, sir.

Q. State whether or not during the year 1877 you had occasion to make a valuation of the property of Ben. Melter; if so, state upon what occasion, and who with.

A. I made a valuation of Melter's property in connection with J. W. Henning.

144 Q. Have you that valuation with you?

A. No, sir; I gave a written valuation to Mr. Krieger.

Q. Do you remember the time that valuation was made?

A. It was made about the end of July or the 1st of August, I don't remember which it was, of last year.

Q. At whose instance did you and Henning make the valuation?

A. Krieger's.

Q. Have you seen the deposition of Henning given in this case, and the valuation filed with his deposition?

A. Yes, sir; I saw it here a few moments ago.

Q. State how that compares with the valuation you and Henning fixed on the property last year when you assessed it together.

A. In my opinion that is a correct copy of our valuation.

Q. What do you now think of the values that you then fixed upon that property?

145 A. I think since that time the value has gone down, but how much I could not state.

Q. You think the values you then fixed upon it were correct?

A. Yes, sir; at that time.

Q. What were the values of the property described in this memorandum attached to Henning's deposition, say the latter part of May, 1877, or along about two months earlier?

A. It may be the value of the property was at that time a little higher,

because we had a gradual decline in property. As to its value two months earlier, I don't know whether there was any material difference or not; the valuation was about the same.

Q. The valuation was about the same?

A. About the same.

Q. Its valuation was made by you and Henning from an examination of the place?

A. It was made by an examination of the property at the place; on the premises at the time.

146 Cross-examination *of* W. O. DODD:

Q. You follow that business?

A. Yes, sir; ever since I came here.

Q. That is your exclusive occupation?

A. Well, I have got property under my control all the time.

Q. You don't follow anything else for a' avocation except your profession?

A. I am agent for property; I have a good deal of property under my control, and attend to the selling of property by agents. I don't sell myself, but have it done by agents for friends.

Q. You don't handle property yourself except through agents?

A. I handle it, and by agents I handle it, but have agents to do only the negotiations.

(Signature waived by consent of parties.)

STATE OF KENTUCKY,
County of Jefferson:

I, H. D. Dougherty, examiner for Jefferson County, certify that the foregoing deposition of Henry Nettleroth was taken before me at the time and place stated in the caption; that said witness was duly sworn
147 before giving it; that it was taken down verbatim in short-hand by me in his presence, and subsequently transcribed in long-hand; and that by consent of the parties the signature thereto was waived.

Complainant was present by attorneys, Messrs. P. A. Gaertner and D. W. Armstrong, but not in person. Defendants were present by attorneys, Messrs. W. O. Dodd and J. P. Helm, only one of the defendants, Jacob Krieger, sr., being present in person.

Given under my hand this 12' day of July, 1878.

H. D. DOUGHERTY,
Examiner, J. C., Ky.

The deposition of Jacob Krieger, sr., taken on the 11' day of July, 1878, at the law office of D. W. Armstrong, cor. Fourth & Jefferson str's, Louisville, Ky., to be read as evidence in an action between Harry Stucky (assignee of Ben. Melter), complainant, and Ben. Melter, Masonic Savings Bank, and Jacob Krieger, sr., defendants, pending
148 in the United States district court for the district of Kentucky.

Deponent being of lawful age, and having been previously sworn, deposed and said:

By D. W. ARMSTRONG:

Q. Was the McBride property on Main street treated as part of the estate of Melter and taken into account in any way in your estimate in 1877?

A. No, sir.

Q. Was the property on Third and Ormsby avenue, sold to Imordi, taken into account?

A. No, sir.

Q. When did Melter sell that property on Third and Ormsby avenue to Immordi?

A. In 1876.

Q. You knew of the sale at the time it was made?

A. Yes, sir; I think so.

Q. Did you observe that S. S. Meddis in the list filed with his deposition a few days ago, included a piece of property on Third and Oak streets?

A. I did not.

149 Q. Melter never owned any property there within your knowledge on Third and Oak streets?

A. I thought he owned that house on Ormsby avenue, or Oak street—a three-storried large brick building.

Q. This property you speak of as having thought Melter owned, it is the same he sold to Imorde?

A. I never thought Melter owned that property. I never considered that as Melter's property.

Q. You think Meddis made a mistake in estimating part of Melter's estate. The property on Third and Ormsby avenue which Melter had sold to Immorde?

A. If Meddis included that in his property he made a mistake. I didn't want to see the list of Meddis. I didn't want to know. I could have seen it if I had wanted to.

Q. You never knew of Melter owning property on Third and Oak streets?

A. No, sir.

B' J. P. HELM:

150 Q. What was your object in getting Henning & Nettleroth to value the estate of Melter in the latter part of July or August, last year?

A. The object of valuing it was to see how much could be relied on at the very lowest that could be got for the property, as Melter thought a composition in bankruptcy was possible. I was to help him to make it. I applied to Henning & Speed for a valuation of the property, knowing that they had the name of being the lowest, or one of the lowest, or about the lowest priced men in the city of Louisville on real estate property. To make a composition in bankruptcy, I wanted to feel positively sure that the property would bring as much as the estimate and in the hope of getting more for it than the estimate would show.

Q. Have you seen a copy of the estimate filed by Henning?

A. Yes, sir; a few minutes ago.

Q. Are you familiar with Melter's property, and with the values of real estate generally in the city.

A. I am.

151 Q. What do you think of that estimate? Give your opinion in detail.

A. The property on the southwest corner of First & Gray streets, valued at $8,000, I think would bring more to-day under the hammer, and would

certainly, at $8,000, be a first-class investment. The second piece of property, valued at $12,000, situated on the southwest corner of Second and Breckenridge, I think that property to-day would bring $12,000, and also would be a first-class investment for anybody to buy and rent it out. The third piece of property is on the corner of Third and Breckenridge streets; there's a store-house, an ice-house, and feed-store in the rear; it is valued at $10,000; which I think it would bring more to-day, and which Melter himself, about two months ago, thought would bring $15,000. The next piece of property, marked here No. 2, a dwelling house on Third
152 street, near Breckenridge, valued at $5,000; the next house adjoining is also valued at $5,000. These pieces I think ridiculously low, as they would bring over $6,000 this day apiece. The next are two houses on Breckenridge street east of the store-house, double house, each one valued at $4,000, which I think would bring more at auction this day, and would pay a good profit as an investment for any purchaser. Fourth, a lot 30 by 100 feet, north side of Market street, near Twenty-first, at $750; that I think cost Melter much more money than that, but which will scarcely bring more than that now. The next one is valued at $950.00, being a lot 95x60, on the west side of Twenty-first; that would scarcely bring more to-day, but would be a good purchase. The next lot, on Dumesnil and Twelfth streets, an ice-house 40x156¼, valued at $600.00; I think the deed will show Melter paid for the vacant lot $600 to
153 Dumesnil. I think the two ice-houses cost Melter $1,400 to build them.

Q. I understand your idea in getting an estimate from Henning & Speed on the property was that if you got the composition through you would be certain to realize not less than the estimate, or perhaps to realize more?

A. Yes, sir.

Q. What part did you expect to take in that composition?

A. The part I was to take was to advance the money to pay every creditor, and to said Melter, by going to see some of his friends and mine who were creditors.

Q. That was your reason, then, for wanting a low estimate on the property?

A. Yes, sir.

Q. Is it unusual or not for your bank to loan on a mortgage for two years?

Ans. Not at all. We have loaned to persons on five years' time. I think our bank is the only one that has a proviso to loan on mortgage.

154 Q. Is it common in your bank to loan on long time?

A. Yes, sir. We are a savings bank, and want to invest certain amounts where we can be made safe. The amount we loan to mortgagees is in the neighborhood of $100,000.00, or a little above that than below it.

Signature waived by consent of parties.

STATE OF KENTUCKY,
Jefferson County:

I, H. D. Dougherty, examiner for Jefferson County, certify that the foregoing deposition of Jacob Krieger, sr., was taken before me at the

time and place stated in the caption; that said witness had been duly sworn before giving it; that it was taken down verbatim, in short-hand, by me, in his presence, and subsequently transcribed into long-han'; and that by consent of parties the signature of witness thereto was waived.

Complainant was present by attorneys, Messrs. P. A. Gaertner
155 and D. W. Armstrong, but not in person. Defendants were present by attorneys, Messrs. W. O. Dodd and J. P. Helm, and only one of the defendants, Jacob Krieger, sr., being present in person.

Given under my hand this 12' day of July, 1878.

H. D. DOUGHERTY,
Examiner, J. C., Ky.

The deposition of Jacob Krieger, taken on the 5' day of June, 1878, at the office of D. W. Armstrong, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the pl'ff in an action between H. Stucky, ass'ee, &c., plaintiff, and Masonic Savings Bank, defendant, now pending in the U. S. dist. court, Ky. district, both parties, by attorney, being present.

JACOB KRIEGER, SR., being duly sworn and examined by Mr. Armstrong, as attorney for the pl'ff, deposed as follows:

1. State your name, age, residence, and occupation.

A. Jacob Krieger, sr.; reside in Louisville, Ky.; I am president of the Masonic Savings Bank.

156 Q. Are you the Jacob Krieger who is defendant in this suit and the president of the Masonic Savings Bank?

A. I am.

Q. How long have you known the bankrupt, Ben. Melter?

A. I have known Ben. Melter ever since 1862 or 1863.

Q. How long have you been connected with the Masonic Savings Bank?

A. I have been connected with the Masonic Savings Bank very near ten years—within a few days.

Q. Has Melter kept an account with that bank?

A. He has.

Q. During what time; for how long past?

A. Ever since I have been connected with the bank; pretty soon after he became a customer of the bank.

Q. Is this book which I now hold in my hand the pass-book of Melter of that bank?

A. Yes, sir; that is one of them.

Q. Is that the book that he had in use in the spring of 1877
157 and during the summer, to the time of his bankruptcy?

A. It is.

Q. Is that the only book of the kind during that time—I mean with your bank, of course?

A. It is.

Q. Does that book contain a correct transcript from the books of the bank of Melter's account?

A. It does up to the 11' of June, since which there has been some entries. The book never was brought back for balance.

Q. What was the consideration of the mortgage executed by Melter to yourself, in May, 1877?

A. It was to take up a note of his, of $6,000.00—his joint note, with two endorsers on it.

Q. Who were the endorsers?

A. One of them was Joseph Isert and the other was Henry Urschel.

Q. Is the note which you refer to the same note that is filed with the examination of Ben. Melter in his bankruptcy proceedings?

158 A. Yes. sir.

Q. When was that note due?

A. That note was due in April, 1877.

Q. Was there any attempt made to renew that note at maturity?

A. Yes, sir; it actually had been renewed when I was not in the bank.

Q. Was his paper in renewal actually made and accepted by the bank?

A. Not accepted. It was left there.

Q. Who were the parties to the renewal?

A. The same parties.

Q. Why was not the renewal accepted by the bank?

A. He wanted more money, which we allowed him to overdraw, and he wanted longer time. We accordingly took mortgages from him, so as to give him two years' time within which to pay them. I objected to some of the endorsers and wanted other names.

Q. Did you regard the paper as presented by Melter on the renewal as good and sufficient?

A. It was not presented in the bank while I was there. I regarded the paper as good notwithstanding.

159 Q. What was the occupation of Mr. Isert, who is a party to that paper?

A. He was a butcher at the time, so far as I know.

Q. Did you know anything of his financial condition at that time?

A. I heard that he had a house and lot worth about $4,500.

Q. Did you understand what his indebtedness was?

A. I thought he had just gone through bankruptcy, and was free from all debts.

Q. Did not Mr. Isert file his petition in bankruptcy within a few weeks after you accepted this mortgage from Melter?

(Question objected to.)

A. I don't think that he did.

Q. Do you know that this Joseph Isert, who is a party to this paper, became bankrupt, filing his petition in bankruptcy?

(Question objected to.)

A. I know that he has filed it since, but I think he filed it after Melter.

Q. What did you know about Mr. Urschel's condition?

A. Mr. Urschel was doing a business to a large extent in produce,

160 and was generally considered very good among commercial men.

Q. What property did Mr. Urschel have?

A. I did not enquire. I don't know what he had.

Q. Did you know where Mr. Isert's property was?

A. I did not.

Q. How did you understand that he was worth four thousand or four thousand five hundred?

A. I took Mr. Melter's statements as to the fact.

Q. Did you have any other information in regard to Isert's and Urschel's financial condition than what you got from Melter?

A. Mr. Melter I took as to the property of Isert; Mr. Urschel stood in commerce in very good report.

Q. Mr. Urschel failed about that time or shortly after?

A. He failed after Mr. Melter failed.

Q. Do you know how long it was after Melter's failure it was before Urschel made an assignment?

161 A. I don't remember the exact time. I think it was two or three weeks after.

Q. How long had the paper been at the bank before your attention was called to it—this renewal?

A. Right the same day or the next day.

Q. Did you take any steps with regard to it at the time that it was brought to your attention in connection with it?

A. No, sir; none else except to tell Mr. Melter that we wanted to give him longer time, and wanted some additional names on it.

Q. Is the paper filed—the note for $6,000—filed with Melter's examination to which we referred a while ago, the original obligation executed for that debt, or is it a renewal?

A. I think it is the original.

Q. Will you please make a memorandum and consult your books on that?

A. I will.

Q. You were not a party to that paper or in any way liable for it, were you?

A. No, sir.

162 Q. Why, then, was the mortgages from Melter to secure that debt made to you?

A. The property that I took the mortgage on had a previous mortgage on, and the bank could not take a mortgage on it. I felt satisfied to endorse for him and take a mortgage in my own name.

Q. Was the difficulty in regard to the bank taking a mortgage on account of some provision of its charter?

A. Yes, sir; as I said, there was a mortgage on the property that I took the mortgage on.

Q. You said the bank could not take it?

A. No, sir; by charter provision.

Q. Did Melter execute a note to the bank for this same debt, or a note to you at the time the mortgage was executed?

A. Yes, sir; a note to me.

Q. You endorsed the note?

A. Yes, sir.

Q. And became liable on it?

A. Yes, sir; and am liable now.

Q. And you took a mortgage as security?

163 A. Yes, sir; as security.

Q. Did Melter execute a mortgage to the bank at the same time—at the same date on which the mortgage was executed to you?

A. He did.

Q. What was the consideration for that?
A. Cash money paid.
Q. Paid to him at what time?
A. A few days previously.
Q. What was the condition of Melter's account with your bank on the first of January, 1877?
A. He was overdrawn $5,494.00.
Q. And on the first day of Feb'y, 1877?
A. He was overdrawn $4,500.
Q. On the first of March?
A. Overdrawn $4,891.
Q. On the first of April?
A. Overdrawn $7,400.
Q. On the first of May?
A. On the first of May it is not balanced.
Q. What was it at the date of the execution of this mortgage?
A. Overdrawn—I could not tell you that. I will tell you to-morrow.

164 Q. What payments did Melter make the bank between the first of April and the date of the mortgage?

A. Sundry payments by discount and cash deposit, amounting to $6,621.10.
Q. Can you indicate how much of that was proceeds of discounts?
A. Yes, sir; about $4,500.
Q. Can you furnish a list of the papers discounted for Melter between the first of April and the date at which this mortgage was executed?
A. Yes, sir; I have not got it now.
Q. When was the arrangement or understanding made with Melter with regard to the execution of the two mortgages?
A. The understanding was some three or four weeks before the mortgages were actually executed; the date I cannot give you, because I did not take any account about it.
Q. What was the reason for taking these mortgages from Melter?
A. He wanted some money. He said that he wanted to pay all his debts,

165 and represented that by getting $6,000 more money he could pay out everything, owing comparatively hardly anything, and during the two years he would sell some of his property and pay us back the mortgages.

Q. What amount of cash did Melter check from your bank, or what amount did you pay him in pursuance of that arrangement?
A. To the amount of at least $6,000.
Q. Do you know to what purpose Melter applied the money that he got from you?
A. I cannot say definitely, but to pay his debts. He came in one day and said, "Krieger, I must have two, three, or four thousand dollars," and a few days after, "I must have so much," and we allowed him to draw and continue to.
Q. Was that arrangement with Melter for the execution of the mortgage made as early as the 1st of May?
A. I think it was. I know that it was made several weeks before.
Q. Have you any means of determining the time at which it was first understood that he was to give a mortgage?

166 A. I have no means of finding the e'act date.

Q. Would you be willing to state that it was earlier than the first of May?

A. I would not like to state the time. It may have been over a week before that time.

Q. What was the reason of the delay in the execution of the mortgages after you and he had come to that understanding?

A. He said to me at one time that he had three or four thousand dollars of whiskey, and if he could sell that well he would not make a mortgage. At another time he stated to me that he had several thousand dollars of ice, and he might sell that to relieve himself. The ice actually went to waste; he could not attend to it.

Q. Was Mr. Melter's indebtedness to the bank increased or diminished after the first of May?

167 A. It was increased on account of the promise of the mortgage, and his statement, as stated before, that likely he would get money from sales of whiskey, &c.

Q. What was the extent of that increase?

A. I think it must have been some five or six thousand dollars; I don't know exactly; I will refer to the book.

Q. Did Mr. Melter make any effort to obtain endorsers on his paper that would suit the bank without executing a mortgage?

A. Not that I know of.

Q. Filed with the examination of Melter in bankruptcy is a note unsigned, dated April 21, 1877, payable four months after date, for $6,000. In whose handwriting is the written portion of that note?

A. In mine.

Q. For what purpose did you fill that note out?

A. It was for a loan, or the proposed renewal, I don't know which.

Q. Was not that unsigned note intended to be executed in renewal of the note for $6,000, signed by Melter, Isert & Urschel?

168 A. I cannot state that positively, but he had b'ought in another note as the note of the same parties, and I think this must have been for another transaction—for additional money.

Q. What was the total amount of paper in your bank on which Melter was bound at the time the mortgages were executed?

A. I cannot tell you that exactly, but I can give a close estimate. He was bound on our mortgage note together with Marcus and a brother-in-law of his, Immorde, $8,800. He was jointly maker on two other pieces of paper amounting to $8,700, with A. Marcus as security. Other paper that the bank held at the time—I don't remember the amount exactly, but perhaps about $4,000, perhaps five.

Q. Please refer to your books on that point for the sake of verifying your present recollection.

A. Yes, sir; I will.

Q. Who was the principal debtor on this paper on which Marcus was bound with Melter?

A. That was the debt of Immorde, and that $8,700 was the debt of Melter.

169 Q. At the time the mortgage was actually executed was any money paid to Melter, or did he check for any?

A. I cannot tell you that exactly. He checked for some, I think.

Q. Is it not true that the entire sum covered by those two mortgages was absorbed in Melter's indebtedness by this $6,000.00 note, and by the overdraft to the bank at the time?

A. I will give a full report to-morrow. The cash advances on account of the mortgages was done because the mortgages were promised beforehand.

Q. Why was not the note which matured April 19–21, for $6,000, paid at maturity?

A. We had agreed to renew it.

Q. When was the agreement as to renewal made?

A. It was several days before the maturity of it.

Q. How long after the maturity before the new paper was offered?

A. I think a day or two after. I could see that in the books, too, and give a full and exact answer.

170 Q. I understand you to say that you were not satisfied to receive the paper in renewal with the old names on it of Isert and Urschel without additional security?

A. We were satisfied to loan Mr. Melter the money thinking him perfectly good, but still wanted other names in addition to it, especially as he had said that he would bring other names before.

Q. Had you, at any previous time in the course of the dealing of the bank with Mr. Melter, taken mortgages to secure his indebtedness to the bank?

A. We had not. The indebtedness never was sufficiently large for the necessity to take mortgages or relieve him by giving him time.

Q. What made the execution of the mortgage necessary or desirable at this time?

A. I think Mr. Melter, through building houses, had made his available means too short for carrying on his usual business. He built a house, corner of First and Gray, which, I think, took some eight or nine

171 thousand dollars cash money out of his usual business capital, and building houses the year before, or two years before—I don't know exactly the time—on Second & Breckenridge, which took some $18,000 out of his business. I think those two things were the cause of his failure—proved to be. We did not think so at the time.

Q. You say that Melter had agreed that he would furnish other names on this paper or renewal?

A. Yes, sir.

Q. When did he promise that?

A. He promised that before the paper was due; two or three days before.

Q. Did he, in fact, bring any paper with other names?

A. He did not; he said to me, "If you are not satisfied, I will give you mortgages." That is his expression.

Q. Taking the amount of Melter's overdraft on the first of April as $7,422.64, I wish you would state whether there was any increase in the amount of his indebtedness to the bank between that date and the date at which the mortgage were executed?

172 A. There was a very large increase—some five or six thousand dollars, according to my memory.

The further taking of this deposition was thereupon adjourned until to-morrow, June 6, at 3 o'clock p. m.

CHAS. A. GRAHAM,
Examiner.

JUNE 6, 1878.

Met pursuant to adjournment, and the direct examination continued as follows by D. M. ARMSTRONG:

(By the WITNESS.) The first question I was to examine was whether that note of $6,000 was an original discount. I stated that I thought it was, but could see in the books. It was an original discount. It was the only discount with those names that we ever had. It was original paper. The next was the increase of indebtedness between the first of April and the date of the mortgage. His liability between the first of
April and the date of the mortgages, which was the 28' of
173 May, was $10,505.44; there was that increase in discounts and over drafts. You wanted to know the liabilities of Melter on all papers that the Masonic Savings Bank held. At the date of the mortgages Mr. Melter was liable on $21,893, on discounted paper. You asked as to money paid out on the day of the mortgage, and the next day $782.29.

Q. Did Melter make any deposit on the day of the mortgage?

A. No, sir.

Q. Did he make any the day following?

A. No, sir.

Q. After passing to his credit the proceeds of the $6,000 note, with you as endorser, how did Melter's account stand?

A. He was overdrawn a very small amount. I did not look, but it is about $120 overdraft, after the two mortgages and these two sums that we paid him; he was then overdrawn one hundred and some odd dollars.

Q. After the mortgages and the amounts withdrawn by Melter
174 on the day of the mortgage, and the day following, if I understand you, his account stood overdrawn $120, or thereabouts?

A. Yes, sir.

Q. At the time of the execution of the note for $600—that is the note executed in December—did the bank hold Melter's paper for a corresponding amount maturing at or about that time?

Ans. No; I think not. If I had known of the question I would have looked in the book more specifically. I know that we did not pay him any money, still I will look in the books.

Q. Your impression and best recollection is that at the time of the transaction in December that no money was paid Melter, but that the proceeds of that were absorbed in prior indebtedness to the bank?

Ans. Yes, sir; money advanced previously.

Q. Did Melter at any time make an assignment to you for the benefit of his creditors?

Ans. He did.

Q. At what date?

175 A. About two weeks before he was declared a bankrupt, perhaps three weeks; I don't know exactly the time; a short time before.

Q. How long was that matter of the assignment to you under consideration or discussion; how long before the execution of the actual deed had that been in contemplation?

A. Well, I don't know how long he contemplated it; I think three or four days before.

Q. Did he advise with you as to whether he should make an assignment?

A. He advised with me some, but I was not his adviser altogether—that I heard of by rumor.

Q. Did you approve of his counsel in making the assignment?

A. I did.

Q. For what reason?

A. To give him time to realize on his property, and pay his debts out, preventing suits.

Q. What did you learn in regard to Melter's condition, financially, between the date at which that assignment was executed and the date
176 of the mortgage or mortgages that you did not know prior to the execution of the mortgages; what new facts had come to your knowledge?

A. I did not learn any new facts about his standing, but learned a few days before he made the assignment that parties had threatened to sue him.

Q. Did you make any investigation of Melter's affairs within the time named in the last question—that is, between the date of the mortgage and the date of the deed?

A. I made an investigation. I want to go further than that, and say prior to taking the mortgages I made an investigation of Melter's affairs, of all that I could learn. I had his real estate valued by Sim Meddis. He stated to me the kind of property he had, and that Melter's property would be worth, in ordinary times, $125,000, but that he thought that Melter's property was worth at the time that I made the inquiry,
177 which was about two months before the mortgages, or three months, that his property would bring, if not sacrificed at the hammer, $100,000 at private sales. After the assignment was made, I again made calculations upon his estate, and took Melter's statement of his indebtedness—after knowing what amount of mortgages he had on the property, and taking his statement of his debts—even in my calculations increasing this indebtedness very largely, and decreasing what he said his property consisted of, in real estate, in stock of goods, in ice on hand, &c., and then found him to be worth over $25,000 more than his entire indebtedness. I may state here that I figured with Mr. Gaertner at a later period than that in my office, and we again took the statement of Melter, and scaled the value of his assets down to a large extent, and increased his statement of indebtedness also very largely, and then the property left something like $11,000 over his liability, according to the best that we could learn of his affairs.

178 I may state here, if it is in place, that after we had taken Melter's mortgages, we considered him good enough for the following transaction in the bank's discounting his note to Stege & Reilling for $508.70. On June 5, we discounted his note secured by stock in the Masonic Savings Bank, stock amounting to $1,900, and loaned Ben. Melter on that

stock $1,500. The provisions by the charter and printed upon all certificates is, "This bank holds by charter a lien for any and all debts that may be due or owing by the shareholders to said bank." By loaning Ben. Melter $1,500 on his stock, the bank relinquished a security that it had prior to any mortgages or anything else, and if the bank had thought Melter was anywhere in danger of failing they would not have advanced money on that stock, but would have held that as security towards his indebtedness. On June 13 we took Ben. Melter as indorser to his brother-in-law, Immorde, for $1,000.00. On June 13, we discounted a note
179 of Ben. Melter given to F. Marcus for $100.00. On the 14' June, notwithstanding his account with the bank was overdrawn $41.01, he claimed to have some money to pay in chancery court, and the bank allowed him again to overdraw $1,075.00, of which overdraft to-day Ben. Melter owes us $689.81. On June 19 the bank discounted the note of W. H. Galt, given to Ben. Melter for $300, and knowing that Mr. Galt was rather weak, we relied on Mr. Melter to make the paper good. On June 20 we cashed his check on the German National Bank, I think, for $375, which we held over, and it is owing to the bank to-day. On July 6 we again took him as endorser in the renewal of the paper of Joseph Imorde and A. Marcus, paper amounting to $8,500.

Q. What was the credit of Stege & Reilling at the time of the discount of which you have spoken?

A. Very good.

Q. Were they regular customers of your bank?

A. No, sir; they are regular customers of the Western Ins. Co.

180 Q. At whose instance did you make that discount?

A. Stege & Reilling's.

Q. Is not their credit equal to the best of Main street houses?

A. That is a question I wish you had not asked. I don't think it is. It is very high.

Q. What was considered the strength and credit of A. Marcus at that time?

A. A. Marcus was good.

Q. He was strong, was he not?

A. Yes, sir.

Q. Ample in himself for the paper that you took from him?

A. I would not have taken so much paper with A. Marcus as security unless the other side was good also. The $8,500 and $8,700 would have been more than I would have wanted to risk on A. Marcus.

Q. What is the credit of Imode?

A. It is only weak. He is entitled to credit. He is a hard-working man, and is entitled to credit, but he is not entitled to get a credit of $8,500.

181 Q. Would you not, without hesitation, consider him entitled to a credit in your bank for half that amount?

Ans. I don't think I would advance him half that amount.

Q. Did you ever have any other instance in the history of the bank—any other instance where you made a transaction such as this that you made with Melter, that is, to become liable personally on paper, and take a mortgage for your indemnity?

A. I have in one instance.

Q. Is it an unusual transaction for you?

A. It is; but I am the largest stockholder in the bank, and where I think I am safe I take extra privileges.

Q. Have you memoranda from which you can state the amount of Melter's overdraft at the date of the mortgages?

Ans. At that time they amounted to very near the mortgages.

Q. You mean that at the time of the mortgages, $6,000 of the sum named in the mortgage was approximately the overdraft.

A. Yes, sir.

182 Q. Have you a memoranda of the date discounts made from 1st of April to the date of the mortgage?

A. Yes, sir.

Q. Call them off, please.

A. On the 7th of April we discounted a note for John Storts, $700, being a note of Melter's. On the 11th of April, a joint note of Joseph Imode and Ben. Melter, $1,000. On April 20th, a note of Ben. Melter with George Phillip Doern, a joint note of $1,500. April 27th, Ben. Melter with A. Marcus, $3,000. On the 27th again, a note of J. J. Schulten to Ben. Meter, $300. On May 9th, a note of Jacob Isert to Ben Melter, discounted by Thompson & Co., $250.00. May 17th, note of W. H. Galt to Ben. Melter, $300. May 22d, note of J. C. Broadhead to Ben Melter, with Weber & Schillinger, $101.45. That is all.

Q. The discount of the large note with Marcus' name on it, was that a renewel or original?

A. That was a renewel—had been discounted long before. I think that is the second renewal. It may have been the first.

183 Q. State whether or not the three pieces of paper held by the bank with the name of A. Marcus, to wit, one piece for $5,700; one piece for $3,000.00; one piece for eighty-odd hundred were originally discounted prior to the first of January, 1877.

A. They were.

Q. The Doerm note to Ben. Melter, April 20th, for $1,500, was that a renewal?

A. That was an original discount.

Q. Was there any paper in the bank from the 1st of May to the date of the mortgage with Melter's name on it, other than that held by the bank? Did you hold any for collection against him?

A. I don't think we did, but that is a thing I cannot tell; I don't think we did, not at that time.

Q. Have you now at hand any memoranda from which you can state the amount of Melter's overdraft after the mortgage?

A. On June 1st his overdraft amounted to $218.33.

Q. Can you state how the amount of Melter's reports would compare with the amount of his checks or withdrawals, between, say the

184 first of April and the date at which the mortgage was signed?

A. His deposit only amounted to $95 and his checks drawn $1,209.24.

Q. Can you give in the month of April what his cash deposits were?

A. $1,231, as I figure it up by his deposit book, which is no doubt correct.

Q. What were his withdrawals within the same time?

A. The withdrawals according to my memorandum were $6,943.65.

Q. Can you now state the credit which Melter had by original discount during the month of April?

A. The whole discount put to his credit was $4,672.80, of which $2,936 was renewal of his paper with Marcus, which deducted from that leaves $1,736.80 by original discount put to his credit.

Q. The same for the month of May if you are able to give it?

A. The credit that he got by original discounts during the month of May were two mortgages of $6,000. I had deposited my note to the bank as collateral security for his loan of $6,000 and $6,000 straight out
185 mortgage. I don't think there was any more. Yes, sir, there was one more discount May 9th, $396.95 put to his credit, but that, I think, was for his renewal. That was Joseph Isert's note for $400. It might have been original discount.

Q. For what purpose did Melter want that $1,075?

A. He said that he had lien notes on one of his Third street houses in the chancery court. He bought the property and minor heirs had an interest in the property, and the notes became payable as soon as they became of age. I knew that to be a fact, but whether he used the money the checks only will show by the indorsements, but he obtained the money under that plea to the bank.

Q. You spoke yesterday of Mr. Melter's building operation having had the effect of reducing his capital. Don't you know that he made a loan of Mr. Coldeway for building purposes prior to the mortgages?

A. Yes, sir; but that only amounted to $7,000.

Q. You were aware of that?

A. Yes, sir.

186 Q. Do you know for what purpose he got that money?

A. I supposed for building. Notwithstanding that Mr. Melter must have paid the amount that I have stated, and even more.

Q. Didn't you know that the house on 1st & Gray was only to cost $4,000.00, and that Storts took his contract at that figure, $4,000, one half payable in groceries?

A. I think the house cost much more and I know Mr. Storts could not take that contract. You cannot build that house to-day for $7,000, under the present low prices. The house on Second & Broadway, Melter told me, cost $21,000. He paid about $170 a foot for the ground alone. It took more money than I stated yesterday. I knew of the mortgage and deducted it in my mind.

Q. Have you had any occasion recently to make an estimate of the value of Melter's estate in bankruptcy, and have you made such estimate?

A. I have.

Q. What is the result of your investigation as to the value of the estate?

187 A. That he is wholly bankrupt and won't pay out.

Q. Is not it your opinion that there will be a large deficiency in it—that the per cent. coming to the creditors cannot exceed twenty-five per cent., on a liberal estimate?

A. I don't think it will.

Q. Do you remember, in the estimate made by you and Mr. Gaertner, what you took Melter's liabilities at?

A. I think we took his indebtedness, which he stated was about $7,000, I think we took it at 10, 12, or $15,000. Mr. Geartner has the figures yet. Then we counted all the mortgages, which were well known to us, on his property.

Q. Did you include anything else in the unsecured liabilities except the debts you have just spoken of?

A. That is all.

Q. Your estimate was on the basis of a debt of $15,000, unsecured, and the mortgage debt you knew of?

A. Yes, sir; I knew that we figured it much larger than Melter stated himself.

Q. Did you make any investigation as to what indebtedness Melter had among the banks prior to taking these mortgages?

188 A. I did not.

Q. Did you know anything of his indebtedness?

A. I did not think he owed any other bank but ours. He did his deposit business exclusively with us, so far as we knew.

Q. What was the occasion of your getting the estimate from Meddis as to the value of Melter's estate?

A. Because every banker, when he has a customer that owes money and wants additional advances, necessarily ought to make all the investigation that he can to learn about the solvency of his customer, and that induced me to make the inquiries.

Q. Are you able this afternoon to fix any more definitely than you could on yesterday the time at which the question of the mortgage was first discussed or suggested between you and Melter?

A. Yes, sir; it was discussed long before I stated yesterday; as early as January or February; that he agreed to sell some property or sell ice, or give us a mortgage. It was much sooner than I stated yesterday.

189 Q. When did you make your first investigation with a view to having the mortgage prepared—such preparation as you made?

A. That must have been in January or February too. I know that it was in cold weather, and I made it in a room near 4th and Main, where I used to go to lunch, and met Meddis there frequently, and I made inquiry of Meddis.

Q. Did you have a list of Melter's property at this time before you?

A. No, sir; I knew it all.

Q. Did Meddis make his estimate off-hand, or did he take time?

A. When I asked him he took about five minutes' time. He walked over and said, "Melter has got property. Let me see; he has property here and here. Melter's property ought to be worth $125,000." He thought it would bring at private sale $100,000.

Q. When did you select the property on which the mortgage was to be given?

A. About two or three weeks before the mortgage actually was made.

Q. Can you fix that date any more definitely?

A. No, sir; I know two or three weeks before the mortgage was executed.

190 Q. Was that as early as the 1st of May or later, the mortgage being dated the 28th?

A. I think it was the 1st of May. It might have been in April, but I could not be definite as to that.

Q. Melter left the renewal of this $6,000 note with Urschel and Isert on it for the purpose of having it accepted by the bank?

A. Yes, sir.

Q. With that expectation and understanding?

A. It could not be with that understanding, because it was agreed upon that he would give different names, or additional names, and if that was not acceptable he would give a mortgage.

Q. You notified him on discovering it, that it was not satisfactory with those names?

A. I did.

The further taking of said deposition was thereupon adjourned to the office of W. O. Dodd, at 3 o'clock p. m., June 10th, 1878.

JUNE 10*th*, 1878.

Met pursuant to adjournment, and the further taking of this deposition continued.

(By the WITNESS.) I was asked how much the overdraft in April amounted to. I said $6,943. That is correct, and it is not correct.
191 I went to the ledger and took the footings, which was $14,366.39, and taking out the overdraft the 1st of April, of course the balance would be overdraft. As I said before, that $6,000 note—Melter stepped in when I was not in the office, and neither was the cashier, and applied to our book-keeper, and the book-keeper foolishly, and without any authority, surrendered the $6,000 note, and made Melter issue his check. Then the renewal which he had brought in was not in accordance with the agreement, which was that he was to bring another name. The result is precisely the same. If he owed $6,000 less to the left hand, he owed $6,000 more to the right hand. So the whole increase of the debt from April to May stands precisely as I have stated it. The note I treated all the time as not paid, because I had not received any consideration.

(Complainant waives all exceptions to answers of the witness in the foregoing deposition so far as the same might be taken for want of responsiveness to the questions.)

Cross-examination by Mr. HELM:

Cr. Ex. *Cr.* 1. What did you think of Mr. Melter's financial condition at the time you executed this mortgage from him as satisfaction for the money the bank let him have?

192 A. I thought his condition was good, that he was responsible and had a surplus over and above his debts to a sufficient amount to sustain himself in business.

Cr. 2. Did you at that time think there was any likelihood of his going into bankruptcy?

A. None whatever.

Cr. 3. What did Mr. Melter think himself about his condition?

A. He told me, "I have three dollars to pay with to one that I owe." That was his statement after. At another time I spoke to him and he said, "I have more than two dollars to one that I owe."

Cr. 4. What, so far as you could gather, was he reported at that time to be worth?

A. From statements made by Mr. Meddis as to his real estate valu-

ation, stock of goods on hand, &c., I think Mr. Melter was safely worth from fifty to seventy-five thousand dollars over his debts.

Cr. 5. At a latter period, when an assignment suggested by Mr. Melter to you, when you then made your investigation, what did you think that he was worth?

A. I made several calculations on investigation on Mr. Meddis' statement, also the statement of his lawyer, Maj. Davis. Myself and
193 Maj. Davis tried to get a full list of all his indebtedness, which we, however, never could do. Mr. Melter, I then found out, had never kept correct books in his business, to show how much he owed; making large allowances for his debts to be larger than he stated, and estimating his property to the best that we could that even then his estate ought to have paid about $25,000 more than all his debts. That was the lowest we put it.

Cr. 6. What did Mr. Melter then think of his ability to pay all his debts?

A. He even then made the statement that he had three dollars to one to pay all his debts. The first idea was that he should make a deed of trust to his real estate property to two or three persons, and let them try and sell the property and pay the debt, to which he objected that he had plenty to pay all his debts and have plenty left.

Cr. 7. At a still later period, about the time of his bankruptcy, when you say you and Gaertner figured, as I understood you to say at that time, after increasing his liabilities and decreasing his assets, that
194 you still found a surplus of $11,000. Do I understand you to say in the last two weeks Mr. Gaertner told you that he still had the figures you then made?

A. Two or three weeks ago he said that he thought that he had the paper yet.

Cr. 8. Is that the same Mr. Gaertner who is one of the attorneys for plaintiff?

A. Yes, sir.

Cr. 9. At the time the bankruptcy was suggested what did Melter think of the idea of bankruptcy, and of the necessity of his going into bankruptcy, and his ability to pay out?

A. He then said that he would pay out and begged me to do all to prevent him from going into bankruptcy. He was uneasy about going into bankruptcy, and did not want to. He didn't make any specific statement then how much he had.

Cr. 10. At the time these mortgages were taken is it not true that Mr. Melter was generally reputed throughout the community, or so far as people knew things, as being entirely solvent?

195 A. Yes, sir; our board of directors, when we spoke about taking the mortgage, the question came up whether he would fail, and one of our best-informed directors says, "There is no danger of him failing. He has plenty to pay his debts." That was W. H. Smith.

Cr. 11. You believed these representations of Mr. Smith, and the whole board of directors, and the reports generally, that you had heard about Melter's solvency?

A. I did. The trouble is that we thought him too solvent, else he would not have been as much in our debt.

Cr. 12. State whether or not there was a considerable depreciation in the stock on hand, of Melter's, from the time these mortgages were given to the time of his bankruptcy, according to his representations?

A. There was a very large depreciation, according to my own judgment, in seeing the stock of goods when we took the mortgage and when the stock was invoiced after the assignment.

Cr. 13. What was the stock of goods worth, according to your judgment, and from what you knew about it at the time that the mortgages were taken?

196 A. I judge about ten or fifteen thousand dollars.

Cr. 14. What were they worth when the deed of assignment was made to you?

A. They were then invoiced at $3,700 or $3,900; something like that.

Cr. 15. Did you have any reason to believe that Melter was insolvent, at the time the mortgage was taken by the bank?

A. None whatever.

Cr. 16. Did you have any reason to believe him insolvent at the time the mortgage was given to you, and you endorsed the note?

A. None whatever.

Cr. 17. Did you then believe him perfectly solvent?

A. I thought so.

Cr. 18. Did you think that he had a large and considerable surplus?

A. I thought that he had considerable.

Cr. 19. That was after investigation?

A. Yes, sir.

Cr. 20. Melter was a regular customer of your bank?

A. He had been there for nearly ten years.

Cr. 21. He made deposits and obtained discounts from the bank?

A. Yes, sir.

197 Cr. 22. Did he keep accounts in any other bank?

A. None, to my knowledge.

Cr. 23. You thought you were keeping the entire account?

A. Yes, sir; I thought he was keeping the entire account with us.

Cr. 24. Were there any outside circumstances, such as paper coming into your bank for collection, or anything of that character, which tended to show you that Melter was insolvent, or to cause you to suspect his solvency?

A. There were none; all papers that we had for collection were promptly paid, except some a month after the mortgages; we had one collection which laid over several days. I think it was for the Baker Powder Company, and that was afterwards settled and paid by Melter outside of the bank.

Cr. 25. How long had you known Melter up to his bankruptcy?

A. I had known Melter since the year 1864 or 5.

Cr. 26. What was his condition then, when you first knew him?

A. He was then doing a good business, and was reputed to have

198 considerable money.

Cr. 27. Of what nationality is he?

A. He is a German.

Cr. 28. Was he an industrious man?

A. Exceedingly so.

Cr. 29. How had he come into possession of this estate that he owned?

A. He made it by industry.

Cr. 30. Did he make it all?

A. Yes, sir; he had made it all.

Cr. 31. What kind of a store was he carrying on at the time of his bankruptcy?

A. He was carrying on a family grocery store, and attached to it was a meat shop and a vegetable store, so-called, "market store."

Cr. 32. Entirely a retail establishment?

A. Entirely so.

Cr. 33. That was the same business he had been engaged in for years?

A. Yes, sir.

Cr. 34. In that business he had accumulated the fortune which he had?

A. Yes, sir; he had at one time sold out, and began again at his old stand.

Cr. 35. When he sold out did he sell out for the purpose of retiring from business?

199 A. He did; that was the general understanding.

Cr. 36. Was the general impression and were his statements to that effect, that he retired with a competency from business?

A. Yes, sir.

Cr. 37. You say he again resumed the business?

A. Yes, sir.

Cr. 38. At his old stand?

A. Yes, sir.

Cr. 39. The same old business?

A. The same old business.

Cr. 40. The same stand where he had accumulated the fortune which he had?

A. Yes, sir.

Cr. 41. And the same character of business?

A. The same business precisely. He had always some drinking connected with his establishment—lager beer lately. He always had wines and liquors. During the war he sold by the glass.

Cr. 42. Where was that store situated?

A. On the corner of Third & Breckenridge, the northeast corner.

200 Cr. 43. How far is that removed from the wholesale portion of the town?

A. About eight squares.

Cr. 44. It is nearly a mile?

A. Yes, sir.

Cr. 45. His trade was then with families?

A. Yes, sir; the best class of trade in the city of Louisville.

Redirect examination by Mr. ARMSTRONG:

R. D. 1. When was it Melter sold his business?

A. I don't know the time exactly; about 1875; I think about the year 1875.

R. D. 2. Didn't he immediately build a house on the corner of Third and Ormsby avenue, and resume business there?

A. Not immediately, I think.

R. D. 3. Almost so?

A. Almost so.

R. D. 4. Was not that business out there unsuccessful, and didn't he withdraw from it?

A. He withdrew from it, but I think the business was successful. A brother-in-law of Mr. Melter's continued the business, and is mak-
201 ing money to all information that I possess. He is also a customer of that bank.

R. D. 5. He came back from the stand on Third and Ormsby avenue to the old stand at Third and Breckenridge?

A. I think he retired at the same time.

R. D. 6. After leaving Ormsby avenue?

A. Yes, sir.

R. D. 7. For how long?

A. I would not like to state how long, because I don't know; but my opinion is that he stayed out of business for some time.

R. D. 8. What had been Melter's habits in respect to drinking for some time previous to the date of his mortgages to you and the bank?

A. He was in the habit of drinking like all gentlemen do. I myself drink and manage a bank. I never saw Melter drunk.

R. D. 9. Was it not generally understood among his neighbors that he was drinking to great excess?

A. Not to any excess that I heard of.

R. D. 10. You did not attribute any of his embarrassments, so far as they were known to you, to that cause?

A. No, sir; I did not.

202 Cr. 11. You did not at that time?

A. No, sir.

R. D. 12. You knew that Melter was unable to pay his debts at maturity, prior to taking this mortgage?

A. No. He was unable to pay so much cash, but if he had sold his property at the time of the mortgages for what it could have been disposed of at private sale, I thought he could have paid every dollar that he owed and would have some money left.

R. D. 13. His ability to pay any money at that time depended upon his selling his property?

A. Yes, sir; like a good many business men; some, even, that are worth one hundred thousand dollars over and above their debts cannot pay, and have to have renewals in bank, among which are all our manufacturing establishments. I would not except B. F. Avery. All our large brewery establishments, except one, all our large furniture factories have to have renewals and accommodation in bank to carry on business; all the tanners in Louisville, except one. There are fourteen very large tanneries in this city, and they all stand precisely in the same light; they
203 must sell their leather or real estate, if they were required to pay their notes, or borrow money somewhere else.

R. D. 14. On how many different occasions prior to the mortgage and subsequent, say to the 1st of January, 1877, was Melter's credit and financial standing the subject of discussion in your bank?

A. I cannot say, exactly. I will explain to you how our bank is run. Any piece of paper that is offered for discount I have unlimited power to take, and we have sometimes no regular board meetings for two months. The directors come in off and on during the day to see what pieces of paper

are offered. A full discussion about anybody's credit is very seldom had, unless I begin to ask what they think about a certain man. I cannot state how many times we may have talked about Melter.

R. D. 15. Who is the W. H. Smith of whom you speak?

A. He is one of our directors. He is now out of business at present. At the time of taking the mortgage he was a director, and is yet, in our bank.

R. D. 16. Can you now recollect the name of any other of the board of directors with whom you discussed Melter's credit?

204 They were all at the board, and no object was had to making the mortgage. We have only five directors, and every one was there.

R. D. 17. You had a regular board meeting prior to the execution of these mortgages, in which that subject was discussed?

A. Yes, sir.

R. D. 18. Was it held for the purpose of considering the Melter debt?

A. As I stated before, I have full power to discount all paper that I think is good, and take mortgages or extend the time, which was the case in the Melter mortgage for two years. When that is done I invariably ask the board of directors to meet and consult.

R. D. 19 You took that course in reference to the Melter mortgage?

A. Yes, sir; I do it with every one; we have as much as $100,000 of such paper out; not less than that.

R. D. 20. Did you, prior to taking the mortgages, hear any discussion of Melter's credit outside of your board, among the community or business men of the city?

A. None that would induce me or would have induced me to consider Melter's credit bad.

205 R. D. 21. Have you any recollection of hearing such discussions at all on the outside?

A. I have heard such talk, as I hear it about all business men from time to time. There is scarcely a firm that is not inquired into; but there was no discussion at all that would have induced me to believe Melter's credit bad. Everybody was very anxious to sell him goods to any amount.

Recross-examination by Mr. HELM:

R. C. 1. Did you hear any discussion of his credit which had a tendency to cause you to think his credit anything rather than good?

A. That is pretty broad. None at all that would have made me doubt in my mind as to the goodness of his credit.

STATE OF KENTUCKY,
Jefferson County:

I, Chas. A. Graham, examiner, certify that the foregoing deposition of J. Krieger was taken, pursuant to agreement, before me, and was

206 read to him in my presence at the time and place, and in the action mentioned in the caption, the said witness, having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statement reduced to writing by me in his presence, both parties by attorney being present, the signature of said witness being waived by consent.

Given under my hand this 6th day of June, 1878.

CHAS. A. GRAHAM,
Examiner.

And on the hearing of this cause, the defendants, The Masonic Savings Bank and Jacob Kreiger, sr., read in evidence the following depositions, to wit:

The deposition of Samuel Russell, Wm. Egelhoff, S. S. Meddis, taken on the 25th day of June, 1878, at the office of Russell & Helm, at Louisville, County of Jefferson, and State of Kentucky, to be read as evidence on behalf of the def't in an action between H. Stucky,
207 ass'ee & plaintiff, and Masonic Savings Bank, defendant, now pending in the U. S. circuit court, both parties by attorney being present.

Dep. of Sam. Russell.

SAMUEL RUSSELL, being duly sworn and examined by Mr. Helm, as attorney for the defendant, deposed as follows:

Int. 1. State your name, age, residence, and occupation.

Ans. Sam'l Russell; age, 39; Louisville, Ky.; occupation, lawyer.

Int. 2. Did you ever, in your capacity as a lawyer, examine a title to certain property of Ben. Melter's, on which he afterwards executed a mortgage to the Masonic Savings Bank and Jacob Krieger, sr.? If yea, state when you examined that title, and when you first spoke to Melter on the subject.

A. In May, 1877, I examined the title to pieces of property on Third and Breckenridge streets, one piece immediately on the corner of Third and Breckenridge and the other piece immediately adjoining, and wrote two mortgages. One of the mortgages was to Jacob Krieger, sr.,
208 and the other to the Masonic Savings Bank, both from Ben. Melter and wife. I examined the title to this property between the 20th and 23rd of May, 1877. On the last-named day, on the 23rd of May, 1877, I had the mortgages written, and delivered them to Jacob Krieger, sr. After the deeds were given to me by Jacob Krieger, sr., to examine the title to the property, I had several conversations with Mr. Melter about the mortgages and about the property, and about his financial condition.

Int. 3. State whether Melter executed these mortgages reluctantly, or whether he was willing to execute the mortgages, and if he said anything to you on that subject, state what he said.

A. He never said anything to me about whether he executed them willingly or reluctantly. I certainly heard no objection from him about executing the mortgages. On the contrary he appeared to be very anxious to have the matter closed up. He expressed no unwillingness about it, but appeared to be rather anxious to have the thing hurried through
209 and fixed up in that way.

Int. 4. What did he say about his financial condition at that time, if anything?

A. It would be impossible for me to give anything like his exact language or anything approaching to it. I talked with him very frequently about his financial condition, and always up to the time that he was put in bankruptcy he expressed himself to me as being perfectly solvent, and having property and assets sufficient to pay his debts. That was the general purport of what he said. Of course I cannot recollect the date of each conversation.

Cross-examination by Mr. ARMSTRONG:

Cr. 1. What was the date of your first conversation with Krieger in regard to these mortgages or their execution?

A. The first conversation I had with Mr. Krieger about the mortgages was on Saturday preceding the day on which I gave him the mortgages which I had written.

Cr. 2. That was on Sunday preceding the 23' of May, 1877?

210 A. I think Sunday was the 20th of the month.

Cr. 3. Did you go to Melter's house with him on that day?

A. I did not go there with Krieger; I either met Mr. Krieger at Mr. Melter's store, or met him just as he was starting away from the store. My best recollection is that I met him at the store.

Cr. 4. Did he give you the papers on that day?

A. I will not be positive about that, but I think he did. He gave me the deeds.

Cr. 5. He had possession of Melter's deed when yon first met with him?

A. I think he did.

Cr. 6. Did he tell you what business he was out there at Melter's about?

A. I don't recollect that he did, further than he gave me the deeds and told me that he wanted the title to that property examined, and for me to do it as soon as possible.

Cr. 7. Did you understand from Melter and from Krieger that these mortgages were both given to secure an indebtedness which Melter then owed the Masonic Savings Bank?

211 A. I think one of them was. The other one I don't know. One of them was, I understood; the other one I don't recollect about.

Cr. 8. Do you mean that you did not understand the consideration for which the mortgage to Jacob Krieger, sr., was executed?

A. I don't know which one it was, but one of the deeds for which the mortgage was executed was, I believe, a debt already existing; whether the other one was or not, I don't recollect.

Cr. 9. Did you have any explanation as to why the mortgage was executed to Krieger. Did you understand that there was an indebtedness on the part of Melter to Krieger?

A. I don't think he gave me any explanation about that; I don't think he did; at least I recollect none now, but my recollection is, that for some reason or other, and exactly what it was I don't know, that the mortgage on the corner house and lot was made to Jacob Krieger, sr.

Cr. 10. It was well known, and understood, was it not, prior to the execution of these mortgages, that Melter was in straightened cir-

212 cumstances, as far as money went—cash to meet his obligations?

A. I cannot say that it was well known at that time; I certainly did not know it at that time, and did not know it for some days or weeks —perhaps weeks afterwards. I will add that I was rather surprised at Melter having to execute a mortgage for money at all at that time.

Cr. 11. Your understanding of his credit prior to that time had been that he was good, and that he commanded large amounts of ready money?

A. Yes, sir; it was.

Cr. 12. Was any explanation given you as to what the circumstances were that made it necessary for him to execute mortgages?

A. I don't know that there was any explanation given to me about it; there might have been, but I don't recollect of any; I don't recollect of any particular explanation being given.

Deposition of Wm. Egelhoff.

Also the deposition of WILLIAM EGELHOFF, taken at the same time and place, and in the same behalf:

The said witness being duly sworn by me, and examined by Mr.
213 HELM for the defendant, deposed as follows:

Q. 1. State your name, age, residence, and occupation, and what was your occupation in May, 1877?

A. My name is William Egelhoff; age, thirty; occupation, cashier of the Masonic Savings Bank, and partner in the brick-yard firm of Lachner, Zabel & Co.; residence, Louisville, Ky. My occupation in May, 1877, was the same.

Q. 2. Did you at that time know Ben. Melter, the bankrupt?

A. Yes, sir.

Q. 3. How long had you known him prior to that time?

A. Knew him about ten years.

Q. 4. When you first knew him what was then his financial condition?

A. It was always considered very good.

Q. 5. What sort of business was he in?

A. Grocery, sometimes.

Q. 6. State whether or not he was considered a safe and prosperous man? (Objected to as being leading and incompetent.)

A. He was always considered so.

Q. 7. At the time these mortgages were executed to Jacob
214 Krieger, sr., and the Masonic Savings Bank, what did you then consider to be his financial condition?

(Objected to as incompetent.)

A. I considered him good.

Q. 8. Had you, then, or any officers of the bank, so far as you knew, the remotest suspicion that he was contemplating insolvency or bankruptcy?

(Objected to as incompetent.)

A. No, sir.

Q. 9. Did you ever have any conversation with Mr. Melter in regard to the executing of these mortgages to Jacob Krieger, sr., and the Masonic Savings Bank prior to the time that they were executed; if so, how long prior, and what did he say about it?

A. Yes, sir; I had a conversation with him prior to that. I could not tell the exact time, but it was during the winter season. It was along about January, I think, when he was sick at home. I spoke to him about it.

Int. 11. What did he then say about it?

A. He had been overdrawing money in the bank. He had an overdraft account, and I was there to see him about the brick-yard firm business, and he then promised that he would make his account

215 good either by a mortgage or the sale of some ice which he then was gathering. I paid his hands which were working for him, hauling ice, out of my own private fund, because he had overdrawn right smart in the bank, and I did not want to pay any more until it was made good, and then and there he told me as soon as he got well that he would either make a mortgage to the bank or pay us out of the proceeds of the ice.

Int. 12. State whether Melter gave any checks on your bank for money after the mortgage was executed, within a day or two of the time that the mortgage was executed? If so, state when and what amount?

A. He gave checks, according to our books: May 30th, one check for $536.77; May 31st, $245.52, and during the month of June he gave right smart checks. I have no memorandum of those here.

Int. 13. How was he generally considered by the community, so far as you know, as to his financial condition, about the time that these mortgages were executed?

A. He was considered good. He was so considered by almost everybody that I knew.

216 Q. You say in your last answer that he was considered to be good by almost everybody that you knew at the time that these mortgages were executed. Did you know anybody who doubted his solvency?

A. I did not mean it in the way you take it. I didn't know anybody that doubted him.

Cross-examination by Mr. ARMSTRONG:

1. Q. Are you a stockholder in the Masonic Savings Bank?

A. No, sir.

Cr. 2. Are you related to Mr. Krieger?

A. Yes, sir.

Cr. 3. What is your relation to him?

A. I am a brother-in-law of Mr. Krieger's.

Cr. 4. How long have you been connected with the bank?

A. About eight years.

Cr. 5. How long have you been cashier?

A. About six years—between five and six years.

Cr. 6. What are your duties as cashier?

A. I most generally take the duties of teller of the bank, and in Mr. Krieger's absence, when he is not about, I attend to the regular
217 duties of a cashier of a bank.

Cr. 7. Mr. Krieger is the active managing officer of the bank?

A. Yes, sir.

Cr. 8. He performs for the bank the duties that elsewhere in most banks are performed by the officer called cashier, does he not?

A. Yes, sir.

Cr. 9. *The* passes upon the discount offered, grants extensions, determines the credit to which persons are entitled, and matters of that kind?

A. Partially.

Cr. 10. Do you have anything to do with these matters?

A. Very often when Mr. Krieger is away.

Cr. 11. When Mr. Krieger is away, attending to his duties, does that devolve on you?

A. It don't devolve upon me necessarily, but I do it anyway very often.

Cr. 12. What was the occasion of your calling on Mr. Melter at his house?

A. On account of business connected with ice hauling.

Cr. 13. Was your firm hauling ice for him?

A. Yes, sir.

218 Cr. 14. Did you have a contract with him to fill his ice-house?

A. Not a contract, but simply a contract to furnish teams at a certain price; to fill it for him; so much a day for teams.

Cr. 15. How much did you pay out for him—by way of wages—outside of the contract?

A. In the neighborhood of two hundred dollars; I don't remember correctly any more.

Cr. 16. That was done during the month of January?

A. During the ice season; I think about that time. I could not give the exact time.

Cr. 17. When did Mr. Melter settle your account?

A. Shortly after he had got out of his bed again?

Cr. 18. Do you remember when that was?

A. I do not. He settled by giving a note, which, however, was promptly paid at maturity.

Cr. 18. For what time did that note run?

A. I think it was sixty or ninety days.

Cr. 19. Do you remember its maturity?

A. I do not; I sold it on outside bank.

Cr. 20. Do you know whether he paid that note by a check on the Masonic Savings Bank?

219 A. I know that he did not pay it by a check on the Masonic Savings Bank.

Cr. 21. At the time these mortgages were executed, did you know that Mr. Melter was overdue on paper in the Citizens' National Bank?

A. No, sir.

Cr. 22. Did you have any knowledge of his indebtedness to that bank?

A. No, sir; none whatever.

Cr. 23. Did you know that his paper was lying over at that time in the German Security Bank?

A. No, sir.

Cr. 24. And in the German National Bank?

A. No, sir.

Cr. 25. What discussion of Mr. Melter's credit did you hear at that time; who did you hear speak of it?

A. I didn't hear anybody.

Cr. 26. When did you last, prior to the execution of those mortgages, hear Ben. Melter's credit discussed?

A. I could not tell; I don't remember.

Cr. 27. How did you know then what his credit was in the community outside of your bank, if you did not hear it discussed or mentioned?

220 A. Just generally hearing from people that he was good—that that he was all right.

Cr. 28. Did you ever hear what his credit was in any particular bank in this city outside of yours?

A. No, sir.

Cr. 29. Did you hear anybody outside of your own bank mention the credit of Melter, subsequent to January, 1877, and prior to the execution of these mortgages? Did you hear it spoken of within that period?

A. I did not from parties outside of the bank.

Cr. 30. Was Mr. Melter frequently in the bank?

A. Yes, sir.

Cr. 31. You stated the year 1877, with Melter largely overdawn in bank, did you not?

A. Yes, sir.

Cr. 32. What was the amount of that overdraft?

A. $5,400.00.

Cr. 33. He was continuously overdrawn on his account from the 1st of January, 1877, to the execution of the mortgage, was he not?

221 A. I think so.

Cr. 34. Cannot you verify that?

A. Taking the balances from the 1st of the month, he was. I could not say about the middle of the month. He very often made large deposits, and then drew against them.

Cr. 35. Can you furnish us a detailed balance of Melter's account so as to show what his standing was at the close of each day's business during that time?

A. I could not now; I could from the books of the bank.

Cr. 36. Will you prepare a statement showing a detailed balance of that account from the 1st of January to the date of those mortgages, showing in the credits such items as are proceeds of discounts?

A. I will.

Cr. 37. Were you present at the first conversation between Mr. Melter and Mr. Krieger, with regard to the execution of these mortgages?

A. No, sir.

Cr. 38. When did you first hear any discussion between them on that subject?

A. Well, it was spoken of, of course, before the mortgages were

222 issued. I don't know how long.

Cr. 39. About how long?

A. I should think two, three, or four weeks.

Cr. 40. What means have you of fixing that date?

A. Because I remember that it was a short time before the mortgages were given; before they were fixing them.

Cr. 41. How many conversations did you hear between them on that subject?

A. I could not say, I think one or two; not over two.

Cr. 42. How often did you hear Mr. Krieger call Mr. Melter's attention to this account there, and the condition of it?

A. Not very often. I could not say how often.

Cr. 43. What did Mr. Krieger say to him?

A. Mr. Krieger would always want him to make it good.

Cr. 44. How often did you hear Mr. Krieger tell him to make it good; about how often?

A. I could not say. Mr. Krieger always told him these things private by himself; I heard him once or twice make the remark.

Cr. 45. Did you ever call Melter's attention to the condition of his account with the bank yourself?

223 A. Yes, sir.

Cr. 46. What did you say about it?

A. I told him that he must make it good.

Cr. 47. How often did you tell him that?

A. I told him that several times, and told him Mr. Krieger desired him to do it; I told him that at the time he was sick, and I advanced the money out of my own pocket, rather than pay any more checks until it was made good.

Cr. 48. That is, you advanced money on this ice account, rather than have him overdraw any more?

A. Yes, sir.

Cr. 49. Was not Mr. Melter's attention called—don't you know of his attention being called—to the condition of his account, at least as much as once a month, from the 1st of January until these mortgages were executed?

A. I could not say that.

Cr. 50. How often did you hear Mr. Melter say that he was going to execute these mortgages?

224 A. I don't remember distinctly how often, but I know that I called his attention to it once, after seeing him at his house.

Cr. 51. Can you state how often; can you give us any idea of about how often?

A. I could not.

Cr. 52. How often did you hear Melter promise to execute the mortgages?

A. Well, I didn't hear him promise anybody but myself.

Cr. 53. You never heard him promise Mr. Krieger to execute the mortgages?

A. No, sir.

Cr. 54. Do you remember how often he promised you that he would execute the mortgages?

A. At least twice.

Cr. 55. When was the first time?

A. The first time was during his illness.

Cr. 56. When was the last time?

A. Shortly after he was well.

Cr. 57. What was the reason of the delay in executing the mortgages?

A. Well, because I think Mr. Melter was just slow about it, and thought perhaps that he could pay it otherwise.

225 Cr. 58. Were you present at the conversation between Krieger and Mr. Melter when Mr. Krieger told Mr. Melter that he would have to institute suit against him?

A. No, sir.

Cr. 59. You never heard of it?

A. No, sir; I never heard that, that I remember of.

Cr. 60. Did you hear Mr. Krieger say to Mr. Melter anything about the steps which he would take to have the account settled?

A. No, sir.

Cr. 61. What statement did Mr. Krieger make to Mr. Melter in your presence, with regard to that account?

A. I don't remember that.

Cr. 62. Don't you remember anything which Mr. Krieger said to Mr. Melter about his account?

A. No, sir; I do not.

Cr. 63. Do you remember any rather heated discussion that took place in the bank between Mr. Krieger and Mr. Melter about his account?

A. I don't remember that.

Cr. 64. Don't you remember that Mr. Melter came in there one day, and that he and Mr. Krieger had a very excited conversation about Mr. Melter's indebtedness to the bank, some weeks before the mortgage was executed?

226 A. I don't remember about that; I don't remember any excited conversation.

Cr. 65. Didn't you hear Mr. Krieger appeal to Mr. Melter to settle that account on the ground that Mr. Krieger had been a friend to him, and that Mr. Melter ought to settle up?

A. No, sir.

Cr. 66. Did you hear Mr. Krieger tell Mr. Melter that the directors were complaining, and that it was necessary to have it settled, that the directors would not allow it to stand that way upon the books?

A. No, sir; I don't remember anything Mr. Krieger said, because it is not my position in the bank to pay attention to what is going on back.

Cr. 67. Your position in the bank is such that you do not have a favorable opportunity of hearing what takes place?

A. No, sir.

Cr. 68. How far back is your stand from Mr. Krieger's desk?

A. About eighteen or twenty feet.

Cr. 69. From the 1st of January to the date of the mortgage Mr. Melter's overdraft had increased about $600, had it not?

227 A. I have only a memorandum up to the 1st of March, with me.

Cr. 70. How did the account stand at that time?

A. About $4,800 overdrawn.

Cr. 71. Do you know anything of Mr. Krieger calling on Mr. Melter at his house?

A. I remember something of that kind; that Mr. Krieger went there, but I don't remember what the result was, or what he went for.

Cr. 72. What enabled you to remember the fact of his having went there. What knowledge had you of it at that time?

A. Because I knew that he had been there, and that he was going there. He said so.

Cr. 73. At what time was it that he made that call?

A. I think it was during his sickness and then once or twice afterwards. I remember that he went several times; that he said that he was going out there.

Cr. 74. Do you know for what purpose he made any of those calls on Melter?

A. I think he went there on account of business with the bank.

Cr. 75. On account of the condition of Melter's account with the bank?

A. I don't know that he went for that particular purpose.

228 Cr. 76. Explain, then, what you mean by your answer to the question before the last.

A. His business with the bank; his deposit account and discount and overdraft account. That is all connected with the business of the bank. I don't know which he went for.

Cr. 77. Was there anything in his discount account, so far as you know, that required mention at that time; at the time of these calls?

A. I don't remember whether there was anything wrong with his discount account or not.

Cr. 78. When did you first speak of these mortgages, or mention the fact that they would be executed?

A. I think it was in April or May, along there some place.

Cr. 79. When were the mortgages executed?

A. I think they were in May.

Cr. 80. What did Mr. Krieger say when you first heard him speak of it?

A. I could not remember that.

Cr. 81. Could you remember anything that he said on the subject at that time?

A. Only that I know that Mr. Krieger always assured us that
229 the account would be made good. I suppose that he was alluding to the mortgages that *that* he was to get from him.

Cr. 81. Who do you mean when you say that "Mr. Krieger assured us" that the account would be made good?

A. Well, the people at the office; myself principally.

Cr. 82. Do you remember the time at which you first heard Mr. Krieger make that statement, that the account would be made good with a mortgage?

A. I don't remember whether he said that, "being made good by mortgage" or not, but being made good by arrangement with Mr. Melter one way or another.

Cr. 83. This overdraft of Melter's was the subject of discussion between you and Krieger; you talked about it?

A. Yes, sir.

Cr. 84. Will you fix just as exactly as is possible for you to do it, how long before the mortgage was given did you hear Krieger first speak of it? State whether one week, two weeks, or more or less as it may be.

A. I should think that it was at least three or four weeks, about,
230 as well as I can remember.

Cr. 85. Did you see Mr. Melter in the meanwhile after Mr. Krieger told him that, before the mortgages were executed?

A. I saw Mr. Melter two or three times a week or oftener.

Cr. 86. What discussion or what talk did you have with him with regard to the execution of the mortgage after Mr. Krieger had told you that it was to be settled up, as stated in your answer before the last?

A. I had no talk with Melter about that whatever.

Cr. 87. Do you mean that you had no talk with him about the mortgages or about his account either?

A. About the mortgages or about his account either.

Cr. 88. Did you request him to settle his account at any time after that?

A. No, sir.

Cr. 89. Did you ask him anything about why there was such delay in the execution of the mortgage?

A. No, sir.

Cr. 90. You have stated that Mr. Krieger said that Melter
231 would settle the account by mortgage or otherwise. Did he indicate any other way in which Melter would settle it, except by mortgage?

A. We talked about some ice Melter had to sell. That was another way he expected to get it.

Cr. 91. What were you relying on to make the account good; the sale of the ice or the execution of the mortgages?

A. I could not tell that; both, I suppose, because we did not think that he had that much ice.

Cr. 92. You knew from the 1st of January all along up to the time that the mortgages were executed that Mr. Melter was very much pressed for money—cash, did you not?

A. I don't know that. He paid his checks off and on all the time. He kept a regular deposit account, and we paid his checks. We never paid any particular attention whether it overdrew him a few hundred dollars more or less. We always thought he was good beyond a doubt.

Cr. 93. Still you knew he was short of ready money—of cash?

We knew that.

232 Cr. 94. You knew that he would have to sell or mortgage property, in order to raise necessary to pay his debts?

A. To pay us.

Redirect examination by Mr. DODD:

Int. 1. Did you know of any bank debts that Mr. Melter owed besides the debt of the Masonic Savings Bank?

A. None.

Int. 2. Is it the custom or not for bank officers to notify customers when they have overdrawn their accounts?

A. In some cases it is; some we know it is not necessary.

Int. 3. Because they know it themselves?

A. Yes, sir; they know it themselves.

Int. 4. Is it an unusual thing for a man to overdraw his account in bank?

A. No, sir.

Int. 5. Is it any evidence of weakness on the part of a customer to overdraw his account?

A. No, sir; it is an evidence of strength according to the judgment of the bank; else we would not allow him to do it.

Int. 6. When you spoke to Melter about his account being over-
233 drawn, what did he say?

A. He said that that would be all right as soon as he got well. I called his attention to it at the time that he was sick, and he said that it would be all right soon; that he would either give us a mortgage, or have this ice sold. I did not think it would amount to that much.

Int. 7. How much did you think that it would amount to?

A. I did not think it would amount to more than $2,000 at the highest, because the expenses in filling the house went to over $1,000.00.

Int. 8. Do you know whether Melter filled all his ice house or not; whether you or your teams filled all the house or not?

A. We filled all that he had to fill, our teams did, and our manager.

Int. 9. Did you know whether he might not have put up other ice, that you didn't have anything to do with?

A. I don't know of any other.

Recross-examination by Mr. ARMSTRONG:

Cr. 1. Is it usual for you to carry overdrafts on your books from
234 month to month of the amount of Melter's overdraft, between the 1st of January and the date of these mortgages?

A. Well, it is nothing unusual. We had it there, and we were bound to do it in that way.

Cr. 2. I mean is that the usual method of transacting business in banks; to carry overdrafts from month to month of that amount for a customer like Melter?

A. It is not business exactly to carry such an amount, but we considered Melter always very good, and we did not push him any. We did not think it was necessary, because we always thought he was all right. He paid us the interest just the same, so it didn't make much difference to us.

The further taking of these depositions was continued by consent until June 27th.

The exhibit filed with the above deposition is in words and figures as follows, to wit:

EXHIBIT.

Statement of the account of Ben. Melter with Masonic Savings Bank.

235	DR.		CR.		Overdraft balance.
1877.			1877.		
Jan'y 1	Overd'ft	5,494 50	Jan'y 2 Cash	206 91	2nd 5,678 19
2	Check	390 60	" 3 Disc't	1,024 04	3rd 5,768 19
3	"	1,114 04	" 12 Cash	400	4 to 12th 5,868 19
4	"	100	" 15 "	378 70	12 5,468 19
13	"	600	" 17 "	131	13 to 15 6,068 19
15	"	175	" 18 "	50	15 5,864 49
16	"	450	" 20 "	108	16 6,314 49
17	"	381 90	" 22 "	76	17 6,565 39
18	"	187 50	" 23 Call	17	18 6,702 89
19	"	146 43	" 23 Cash	500	19 6,849 32
20	"	390 58	" " "	50	20 & 21 7,131 90
22	"	534 32	" 24 "	152 50	22 7,590 22
23	"	1,586 50	" 23 Disc't	5,832	23 1,777 72
24	"	500	" 25 Cash	78 45	24 3,125 22
29	"	430	" 26 "	100	25 3,046 77
30	"	1,550	" 27 "	144	26 2,946 77
Feb. 5	"	669 26	" 29 "	138 53	27 & 28 2,802 77
12	"	5,700	" 30 "	62	29 3,094 24
19	"	172 10	Feb. 2 "	135	30 & 31 4,582 24
20	"	108 06	" 5 Disc't	669 26	Feb'y 2 to 5 4,447 24
					5 to 8 4,447 24
21	"	3,000	" 8 Cash	115	8 to 12 4,332 24
					12 to 19 4,508 94
23	"	397 27	" 12 Disc't	5,523 30	19 4,018 04
					20 4,126 10
24	"	39 30	" 19 Cash	663	21 & 22 4,174 10
					23 4,571 37
26	"	50	" 21 Disc't	2,952	24 & 25 4,520 39
					26 4,517 39
27	"	197 22	" 24 Cash	90 28	27 4,714 61
28	"	202	" 26 "	53	28 4,891 61
			" 28 "	85	....
236					
M'ch 1	Overd'ft	4,891 61	M'ch 1 Cash	92 66	M'ch 1 5,006 35
" 1	C'ks	207	" 2 "	142 45	2 to 5 4,863 90
" 5	"	80 50	" 6 "	74	5 4,944 40
" 6	"	819 94	" " Dis't	393 60	6 5,296 74

Statement af the account of Ben. Melter with Masonic Savings bank—Continued.

Dr.				Cr.					Overdraft balance.
" 7	"	250 10		" 7	"	223 09	7	5,323 75	
" 8	"	22 77		" 16	Cash	200	8 & 9	5,346 52	
" 10	"	24 05		" 19	"	102	10 to 13	5,370 57	
" 13	"	20		" 20	"	443	13	5,390 57	
" 14	"	442		" 21	"	93 85	14	5,832 57	
" 15	"	1,176 46		" 26	"	210 50	15	7,009 03	
" 17	"	200		" 27	"	150	16	6,809 03	
" 19	"	240 15		" "	"	50	17 & 18	7,009 03	
" 20	"	405		" "	"	108	19	7,147 18	
" 22	"	97 13		" 29	"	119	20	7,109 18	
" 23	"	97		" 31	"	75	21	7,015 33	
" 26	"	105					22	7,112 46	
" 27	"	425 25					23 to 26	7,209 46	
" 28	"	126 25					26	7,103 96	
" 29	"	200					27	7,221 21	
" 30	"	54 18					28	7,347 46	
" 31	"	15					29	7,428 46	
							30	7,492 64	
							31	7,423 64	
Ap'l 1	Overdr'ft	7,422 64		Ap'l 3	Cash	100	Ap'l 1	7,422 64	
" 2	C'ks	150		" 5	"	141	" 2	7,572 64	
" 4	"	50		" 9	"	25	" 3	7,472 64	
							" 4	7,522 64	
" 5	"	44 43		" 11	"	300	5 to 9	7,426 37	
							9	7,401 07	
							10	7,421 07	
							11	7,489 42	
" 10	"	20		" 13	"	79 10	12	7,519 42	
237									
							13	7,465 32	
" 11	"	368 35		" 16	Di'c't	141 30	14 & 15	7,640 70	
" 12	"	30		" 20	Cash	500	16 to 20	7,545 77	
" 13	"	25		" "	Disc't	1,500	20 to 24	5,565 39	
							24	5,579 99	
" 14	"	175 38		" 27	Cash	111 35	25 to 26	11,579 99	
" 16	"	46 37		" "	Disc't	3,231 50	27 to May 4	11,501 04	
" 20	"	19 62		May 4	Cash	95	May 4 to 9	11,406 04	
" 24	"	14 60		" 9	Disc't	396 95	9 to 23	11,406 04	
" 25	"	6,000		" 30	Disc't	12,000	23 to 30	11,436 04	
" 27	"	3,263 90					31	218 33	
May 9	"	396 95							
" 23	"	30							
" 30		536 77							
" 31		245 52							

238 *Dep. of S. S. Meddis.*

JUNE 27TH, 1878.

Also the deposition of S. S. Meddis, taken at the same place, on the same behalf, on June 27th. The said witness being duly sworn by me and examined by Mr. HELM for the defendant, deposes as follows:

Int. 1. State your name, age, residence, and occupation.

A. S. S. Meddis; residence, Louisville, Ky.; age, forty-one; occupation, real estate agent and auctioneer.

Int. 2. State whether or not you are acquainted with the property which belonged to Ben. Melter in January, 1877.

A. I am familiar with it.

Int. 3. State whether you ever had a conversation with Jacob Krieger, sr., about the value of that property, about that time; and if so, state what you then stated to be its value.

A. I think I had a conversation with Mr. Krieger some time about January, 1877, in reference to the value of that estate, and my recollection is that I told him the estate was worth $100,000 at that time.

Int. 4. Did you make that estimate after considering the various
239 pieces of real estate belonging to said Melter?

A. I made it after a rough and hurried estimate of what it would bring. Melter had a very fine estate, and very choice in its location, and a great deal of it would have brought what is termed a fancy price because of its location.

Int. 5. Have you lately made any estimate as to what you think that property ought to have brought in the early part of 1877; if so, state what was the result of that?

A. Well, sir, when I was advised that I was to give a deposition, I sat down this morning, in company with my partner, and we compared notes, and my estimate of what it would have brought then was $96,000—property that I was advised belonged to Mr. Melter at that time.

Cross-examination by Mr. ARMSTRONG:

Cr. 1. Do you know when Melter bought the various pieces of property which he owned in January, 1877?

A. No, sir; I don't know but one piece; that I sold him myself.
240 I sold him that some time in the winter of 1866–'7, in the neighborhood of 20th & Market.

Cr. 2. Had not Melter owned most of the property—all, indeed, with trifling exceptions—which he held in January, 1877, for a number of years?

A. No, sir. I think that one piece of property that he had bought corner of 1st & Gray.

Cr. 3. Do you know what he gave for that?

A. Yes, sir; I think I know. He gave $2,900, with an old house on it.

Cr. 4. When did he buy that?

A. I think he bought that in 1876. I am not certain—1875 or 1876.

Cr. 5. Than that piece and the piece on Market that you sold him—had he not held the real estate for a number of years?

A. The major portion of it he had.

Cr. 6. What has been the history of real estate market in Louisville since the time at which Melter purchased this real estate which he held?

A. Some of the property that he held has gone very much higher than when he bought it, and then gone down again very much lower. A large portion of this property—the major portion—I suppose, he has
241 owned through the period of real estate.

Cr. 7. Has there not been a decline in real estate in the city of Louisville within the last five years?

A. Yes, sir; a very marked decline in five years.

Cr. 8. And probably to what extent or average?

A. Well, sir, the average is at least fifty per cent.

Cr. 9. Do you consider that the property of Melter was effected by that decline, as other property in the city was?

A. Of necessity so.

Cr. 10. Suppose the cost of this real estate of Melter's to have been $100,000, what do you consider would have been a fair discount from that cost in consequence of the depreciation up to January, 1877, supposing Melter's purchases to have ranged from 1869 to 1874?

A. Well, as I said before, Melter's property was in a fancy location, and while the average decline of real estate has been fifty per cent., it is not

applicable to that particular estate, and to-day the decline in that
242 estate would not be over thirty per cent., and in January, 1877, I doubt whether it would have exceeded twenty per cent.

Cr. 11. Have you offered any of the Melter estate for sale at any time recently?

A. Yes, sir.

Cr. 12. What portion of it?

A. I offered a piece at the corner of Second & Breckenridge streets some time last summer.

Cr. 13. Do you know what proportion the bid that you received on that property bore to its cost?

A. Yes, sir; from information that I have, that property brought about sixty-seven to seventy per cent.

Cr. 14. What was the occasion of Mr. Krieger's inquiry of you in regard to Melter's estate, so far as known and understood by you?

A. Well, I don't know unless it was occasioned by my going there to get a piece of paper discounted of Mr. Melter's. It originated in this way: I sold him a piece of property for Mrs. Breckheimer, and a note of two hundred and odd dollars came into my hands in the transaction. I took the note there, & Mr. Krieger discounted it for me. We were lo-
243 cated very close together, and I was intimate with Melter. We went into an eating-house one day and ate dinner together. I cannot recollect exactly. I never expected to be called upon to refer to it again.

Cr. 15. Did Mr. Krieger at the time state anything in explanation of the inquiry?

A. Yes, sir.

Cr. 16. Did you make any figures for Mr. Melter's estate?

A. I don't recollect that I made figures. I lived at the corner of 1st & Breckenridge, and I doubt very much whether there was two nights in one week that I was not down there to his place. I was trading with Melter a good deal, and I had all of his property under consideration in a trade, and I was familiar with it.

Cr. 17. Did Mr. Krieger mention the different pieces?

A. I expect that I knew better than Mr. Krieger.

Cr. 18. Do you remember of his mentioning them?

A. No, sir. I file the estimate that I made as of January 1st, 1877, marked "S. S. M., No. 1."

244 The exhibit above referred to is in words and figures as follows, viz:

EXHIBIT.

3rd & Breckenridge	15 000
2 & Breckenridge	16 000
3rd st., next to grocery	9 000
3rd st., 2nd door from grocery	10 000
Breckenridge, 2 & 3	11 000
1st and Gray	10 000
Main st. property	7 000
Market & 19th	2 000

Oak st	1 000
3rd & Oak	15 000
	$96 000

Value, Jan'y 1st, 1877.

STATE OF KENTUCKY,
Jefferson County:

I, Chas. A. Graham, a notary public duly commissioned and qualified as such, in and for the county of Jefferson and State of Kentucky, certify that in pursuance of agreement between counsel, I was attended at the office of Russell & Helm, in the city of Louisville and county & State aforesaid, on the 25th day of June, 1878, and between the hours of eight o'clock a. m. and six o'clock p. m. of said day, by said Russell,
245 Wm. Egelhoff, and S. S. Meddis, witnesses of sound mind and lawful age, and that they were by me carefully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, of their knowledge touching the action mentioned in the caption.

That their examinations were by me reduced to writing in their presence, read to them in my presence, both parties being present by attorneys, the signatures of said witnesses being waived by consent; I have retained said deposition in my possession for the purpose of forwarding the same with my own hand to the court, for which the same were taken.

I further certify that I am not of counsel or attorney for either of the parties in said depositions named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof I have hereunto set my hand and seal this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

CHAS. A. GRAHAM,
Notary Public.

246 *Depo. of W. W. Gardner.*

The deposition of W. W. GARDNER, taken on the fifteenth day of July, 1878, at the office of Gardner, Stucky & Spendle, court place, Louisville, Ky., to be read as evidence on behalf of the defendants in an action between H. Stucky (assignee of Ben. Melter), plaintiff, and the Masonic Savings Bank, &c., def'ts, pending in the district court of the United States for the district of Kentucky.

Defendant being of lawful age, and first duly sworn, deposes and says:

By J. P. HELM, att'y for def't:

Int. 1. State your name, residence, and occupation.

A. W. W. Gardner is my name; residence, Louisville, Ky.; occupation, assignee in bankruptcy.

2. Are you the partner of Harry Stucky, the assignee of the bankrupt, Ben. Melter?

A. I am.

3. As such, are you acquainted to a certain extent with the affairs of the said bankrupt?

A. I am.

4. Who are your general counsel in the matter of Ben. Melter, bankrupt?

A. D. W. Armstrong, Arthur Cary, and P. A. Gaertner.

5. Who conducted the examination of Ben. Melter in the proceedings in bankruptcy?

247 A. Gaertner & Armstrong, I think.

6. What were the instructions given them at the time the' examined Ben. Melter, if any?

A. I instructed them to investigate or examine Melter in regard to his business transactions in order that we might become as well acquainted with his affairs as he was himself, and particularly to examine him with a view to ascertaining if he had made any preferences.

7. Did they examine with that view?

A. Yes, sir; to some extent.

8. Did they omit to examine in that case or except the case of Adam Exner?

A. Not that I know of.

9. Did they examine at all as to Adam Exner's claim?

A. They did not in the deposition I saw.

10. Is there a suit pending of Harry Stucky, assignee, against Adam Exner, with a view to overthrow his mortgage?

A. Yes, sir.

11. Who represented Adam Exner?

A. Gaertner & Armstrong.

12. In that examination of Melter, did he state anything about the amount of his stock on hand, encluding ice, or did he make any statement as to what he had said about the first of June, as to the stock

248 on hand including ice?

A. Melter's answer to that question put to him by Gaertner and Armstrong, was at first that he didn't know; but the question was put in a different shape, and he answered in the statement he had made he had in merchandise on hand to the amount of seventeen thousand ($17,000) dollars; that in his estimate to arrive at that he estimated his ice at ten thousand ($10,000) dollars, which proved afterwards not to be worth exceeding three thousand ($3,000) dollars.

13. That is his estimate or statement as to the first of June?

A. Yes, sir.

14. In that examination did Melter make any statement about the amount of antecedent debts paid with groceries, within two months of his bankruptcy. If so, how much?

A. I think he stated he paid about two thousand ($2,000) dollars in groceries.

15. Within two months of his bankruptcy?

A. Yes, sir; within two months of his bankruptcy.

W. W. GARDNER.

STATE OF KENTUCKY,

County of Jefferson:

249 I, H. D. Daugherty, examiner for Jefferson County, certify that

the foregoing deposition of W. W. Gardner was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving it; that it was written by me, in his presence, and read to and subscribed by him in my presence.

Plaintiff was present, neither present by attorney nor in person; defendants were present by their attorneys, J. P. Helm and W. O. Dodd, but not in person. No other party was present in person, by agent or attorney.

Given under my hand this 15th day of July, 1878.

H. D. DAUGHERTY,
Examiner, J. C., Ky.

DISTRICT OF KENTUCKY:

I, Austin Ballard, clerk of the district court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 239 pages (this included) contains a true and complete transcript of the record in the case mentioned in the caption hereof.

Witness my hand and seal of said court, at office, in Louisville, this 5th day of March, A. D. 1879.

[SEAL.] AUSTIN BALLARD, *Clk.*

250 And on another day of our said term of our said court, to wit, on Thursday, April 17th, A. D. 1879.

This cause coming on to be heard, and the court now being sufficiently a'vised, it is the opinion of the court that the mortgage made by the bankrupt, Ben. Melter, May 28th, 1877, to the Masonic Savings Bank, was valid as against the assignee of the said bankrupt, and not in fraud of the provisions of the bankruptcy act. It is therefore ordered, adjudged, and decreed that the decree of the district court entered on the 18th day of February, 1879, setting aside, annulling, and holding for naught the said mortgages, be and the same is hereby reversed.

And it is the opinion of the court that the mortgage made by said bankrupt May 28th, 1877, to Jacob Krieger, sr., was made to secure a liability incurred at the time of making said mortgage, and is valid against the assignee of said bankrupt and not in fraud of the provisions of the bankruptcy act. It is therefore ordered, adjudged, and decreed that the decree of the district court entered on the 18th day of February, 1879, setting aside, annulling, and holding for naught said mortgage be and the same is hereby reversed.

It is further ordered, adjudged, and decreed that the amended bill of complaint filed by appellee against said appellants be and the same
251 is hereby dismissed.

It is further considered by the court that appellants recover of appellee their costs herein expended.

And at another term of our said court, held for its October term, 1879, to wit, on Thursday, December 23rd, 1879.

Came the complainant, Harry Stucky, assignee, by D. W. Armstrong, his counsel, and prayed an appeal from the decree entered herein on the 17th day of April, 1879, to the Supreme Court of the United States, which is granted.

Whereupon said complainant tendered his appeal bond, with W. W. Gardner as surety, which bond is approved by the court and ordered to be filed.

The appeal bond above referred to is as follows:

252 Circuit court of the United States, district of Kentucky.

HARRY STUCKY, ASSIGNEE IN BANKRUPTCY of Ben. Melter, appellant,
vs.
THE MASONIC SAVINGS BANK AND JACOB Krieger, appellees.

Know all men by these presents that we, Harry Stucky, principal, and W. W. Gardner, surety, are held and firmly bound unto the Masonic Savings Bank & Jacob Krieger in the sum of five hundred dollars to be paid to the said Masonic Savings Bank & Jacob Krieger, their successors, executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this twenty-fourth day of December, A. D. 1879.

Whereas the above-named Harry Stucky hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Harry Stucky shall prosecute his said appeal to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HARRY STUCKY. [L. S.]
W. W. GARDNER. [L. S.]

Sealed and delivered in presence of—
SAM'L B. CRAIL,
Clerk U. S. Cir. Court, K'y District.

253 DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do certify that the foregoing 252 pages contains a true and complete transcript of the record in the case mentioned in the caption hereof.

Witness my signature and seal of said court this 24th day of December, 1879.

[SEAL.]

SAMUEL B. CRAIL, *Clerk,*
By HENRY F. CASSIN, *D. C.*

254 UNITED STATES OF AMERICA,
District of Kentucky:

To the Masonic Savings Bank and Jacob Krieger, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States to be held at Washington, on the 11th day of October next, pursuant to an appeal granted by the circuit court of the United States for the said district of Kentucky, wherein Henry Stucky, assignee in bankruptcy of Ben. Melter, is complainant and you are defendants, to show cause, if any there be, why the decree in said cause mentioned should not be reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of December, A. D. 1879, and of our Independence the 104th year.

[SEAL.]

W. H. HAYS,
U. S. District Judge.

255 Executed the within citation on Jacob Krieger, by delivering to him a true copy thereof, and on the Masonic Savings Bank, by delivering a true copy thereof to Jacob Krieger, the president of said bank, this 24th day of Decem., 1879.

R. H. CRITTENDEN,
U. S. Mar.,
By THOS. H. TAYLOR,
Dep. Mar.

Marshal's fees $4.00.

(Indorsed:) Harry Stucky, assignee in bankruptcy of Ben. Melter, appellant, vs. The Masonic Savings Bank & Jacob Krieger. Citation.

(Indorsement on cover:) No. 164. Harry Stucky, assignee in bankruptcy of Ben. Melter, appellant, vs. The Masonic Savings Bank and Jacob Krieger, sr. Kentucky C. C. U. S. Filed 30th December, 1879.

OFFICE SUPREME COURT U.S.
FILED
NOV 29 1882
JAMES H. McKENNEY, CLERK

108-74

Supreme Court of the United States

OCTOBER TERM, 1882.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

HARRY STUCKY, ASSIGNEE, . Appellant,

AGAINST

THE MASONIC SAVINGS BANK, Etc., Appellees.

Appellant's Brief.

P. A. GAERTNER,
D. W. ARMSTRONG,
L. N. DEMBITZ,
Counsel for Appellant.

COURIER-JOURNAL JOB-ROOMS PRINT.

Supreme Court of the United States

OCTOBER TERM, 1882.

FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

HARRY STUCKY, ASSIGNEE OF BEN. MELTER, . . . APPELLANT,

AGAINST

THE MASONIC SAVINGS BANK AND JACOB KRIEGER, SR., APPELLEES.

ABSTRACT AND ASSIGNMENT OF ERRORS.

I. ABSTRACT OF CASE.

The appellant, as assignee in bankruptcy, in a suit in the District Court to sell the encumbered estate of the bankrupt Melter, filed an amended bill assailing, as being in fraud of the provisions of the bankruptcy act, two mortgages made by the bankrupt, one to each of the appellees, within two months of the commencement of the proceedings in bankruptcy. Upon answer, in which the main averments of the bill are denied, and on replication and proofs, the case was submitted to the District Court, and a decree rendered setting aside the two mortgages as fraudulent preferences. The question was raised wholly on the submission of the case in chief. The defendants in the District Court appealed to the Circuit Court, which, on the 17th of April, 1879, reversed the decree of the District Court as to each defendant, and dismissed the amended bill as to each with costs, reciting in its decree that each of the mortgages was a valid lien. The questions in the Circuit Court were raised on the transcript from the District Court. This decree of reversal and dismissal is found on page 94 of the printed record. It is the decree from which the appeal to this court is taken.

II. We Assign for Error:

1. That the Circuit Court erroneously found the evidence insufficient to sustain complainant's bill as to the fraudulent character of the mortgage given to the Masonic Savings Bank.

2. That it erroneously found the evidence insufficient to sustain the bill as to the fraudulent character of the mortgage given to J. Krieger, sr.

3. That the Circuit Court erred in adjudging that the mortgage of Ben. Melter to the Masonic Savings Bank was valid as against the assignee of said bankrupt, and not in fraud of the provisions of the bankruptcy act.

4. That the Circuit Court erred in adjudging that the mortgage of Ben. Melter to Jacob Krieger, sr., was made to secure a liability incurred at the time of making said mortgage, and is valid as against the assignee of said bankrupt, and not in fraud of the provisions of the bankruptcy act.

5. That the Circuit Court erred in reversing the complainant's decree obtained in the District Court against the Masonic Savings Bank, when it should have affirmed the decree.

6. That it erred in reversing the complainant's decree obtained in the District Court against J. Krieger, sr., when it should have affirmed the decree.

7. That it erred in dismissing the complainant's bill against each of the defendants with costs, when it should have adjudged the costs in the Circuit Court in complainant's favor against each of the defendants.

A reversal of the decree of the Circuit Court is now prayed.

DAVID W. ARMSTRONG,
Of Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1882.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

HARRY STUCKY, ASSIGNEE, . APPELLANT,
AGAINST
THE MASONIC SAVINGS BANK AND JACOB KRIEGER, SR., . . . APPELLEES.

Argument and Points for Appellant.

POINTS.

1. The rule as to preferences under the Bankruptcy Act, laid down by this court in Toof vs. Martin, Wager vs. Hall, Buchanan vs. Smith, and Merchants National Bank vs. Cooke, was not overruled, nor intended to be overruled, by the decision in Grant vs. First National Bank of Monmouth.

2. The amendment of 1874, which requires that the creditor should "know" that a fraud upon the bankruptcy laws was intended, does not enhance the degree of proof required, as to the preferred creditor's having reasonable cause to believe that his debtor was insolvent. (Rogers vs. Palmer, 102 U. S. 266.)

3. Section 5130 R. S. U. S., which raises the presumption of fraud as to certain sales and conveyances, is unaffected by the amendments of 1874; it embraces real estate mortgages made by a trader, and throws on a creditor receiving them on the eve of bankruptcy for an antecedent debt the burden of showing the absence of fraud against the bankruptcy laws.

4. Where the creditor, who has received an unlawful preference, denies in his testimony his knowledge of, or belief in, the debtor's insolvency at the time of the preference given, but admits that he knew facts which amount to insolvency in the eye of the law, the inference from these facts will prevail over his denial.

5. Where the preferred creditor admits that he knew the property owned by the debtor, and is shown to have known of debts in excess of the value of such property, as it would be estimated by men of ordinary prudence and capacity, he will be held to have had reasonable cause to believe his debtor insolvent, although he may claim that the property was, in his opinion, worth a sum in excess of the debts known to him.

6. A mortgage leaving to the debtor the privilege of paying off the debt secured by it at his own option, when given for an antecedent debt by an insolvent, can only be accepted by the creditor with the motive of securing his debt, and if the latter has reasonable cause to believe the mortgagor insolvent, he "*knows*" that a fraud on the bankruptcy laws was intended.

May it please the Court:

This was a suit in equity, brought by the appellant as assignee in bankruptcy of Ben. Melter, in the District Court of the United States for the Kentucky District, against the bankrupt, his wife, and those holding mortgages on his houses and lots, in order to obtain a sale, clear of lien and dower, and a distribution according to priorities. An amended bill was filed, in which two mortgages, each for $6,000, made respectively to the appellee the Masonic Savings Bank, and to the appellee Jacob Krieger, sr., within two months of the commencement of proceedings, are attached as preferences in fraud of the bankrupt law. The late Judge Ballard, as district judge, sustained the amended bill, and set aside the mortgages, giving, however, to the bank, leave to prove the debts covered by both mortgages as unsecured claims. This decree, on appeal to the circuit court, was reversed by Judge Baxter. The object of the present appeal is to have the reversing decree of the circuit court reversed in its turn, with instructions to affirm the decree pronounced in the district court.

The mortgages in question are dated on the 28th of May, 1877; acknowledged on that day by the bankrupt; acknowledged by his wife and put to record on the 30th day of that month. The proceedings in bankruptcy were begun by creditors' petition on the 27th of July, of that year. The assignee was appointed early in September.

The Pleadings.

The suit was brought on the 29th day of September, 1877, and the amended bill was filed on the 5th day of February, 1878. Its main allegation as to the Krieger mortgage is the following: "That said Ben. Melter, being then and there insolvent, did within two months . . . execute and deliver to said J. Krieger, sr., a certain deed of mortgage, etc." And again: Said deed of mortgage was executed and delivered with a view to give a preference to the said defendant, J. Krieger, sr., who was a creditor; . . . and that the said defendant, J. Krieger, sr.,

then and there had reasonable cause to believe that said Ben. Melter was insolvent, and knew that said deed of mortgage was made in fraud of the laws of bankruptcy." (Pr. rec. p. 8.)

Substantially the same allegation follows with regard to the other mortgage, which was made on the same day to the Masonic Savings Bank. (*Ib.* p. 9.)

Then follows a paragraph headed with the number (3), to the effect that said Melter, being then insolvent or in contemplation of insolvency or bankruptcy, did within three months, . . . by the deed of mortgage described in the first paragraph of this amended bill, convey . . . the certain portions of his property described . . . to the defendant, J. Krieger, sr., with a view to prevent his said property from coming to the assignee in bankruptcy, or to defeat the object of said laws; . . . that the said J. Krieger, sr., then had reasonable cause . . . and that he knew . . . as above. (*Ib.* 9, 10.) As it turns out that Krieger was not really a creditor of nor a surety for the bankrupt, when the mortgages were prepared, and that he assumed an apparent liability on his behalf only for the purposes of the bank, the third paragraph may be deemed material. The clause of the law on which it is based, the second paragraph of the old 35th section, seems to have been framed to meet among other cases those like the present, in which a payment or security is made to a third person, with the view of benefiting a creditor or surety of the failing debtor.

Separate answers were filed by Jacob Krieger and by the Masonic Savings Bank, of which he is the president, each of these answers meeting only so much of the amended bill as assails the mortgage made to the respective respondent. The answer of the former denies that the mortgage was made to him while Melter was insolvent or in contemplation of insolvency; that it was made with a view to give him a preference; that he was then a creditor or had a claim against Melter, or was under liability for him; that he had reasonable cause to believe Melter insolvent, or knew that the deed was made in fraud of the bankrupt law. He denies in like manner the averments of the third paragraph, and states that "the mortgage was made to se-

cure a liability created simultaneously with the execution thereof." (*Ib.* 16 and 17.)

The answer of the bank, sworn to by Jacob Krieger, as president, is made up of three denials: That Melter "being then or there insolvent or in contemplation of insolvency, did within two months before . . . execute . . . a certain deed of mortgage; . . . that said mortgage was executed with a view to give a preference; that it had reasonable cause to believe . . . or that it knew. . . ." (Pr. rec. pp. 14, 15.)

Among the rules of the District Court for the District of Kentucky, adopted on the 27th of July, 1870, is the following:

> No. 64. All material allegations of a bill (that is, all such without which the plaintiff would not appear entitled to the same measure of relief) shall be considered as admitted, unless denied by the answer.

Hence every averment of the amended bill, which is not specifically and separately denied in the answers, must be taken for true.

There was a general replication to both answers and the parties proceeded to take

PROOF.

With the bill are exhibited certified copies of the two mortgages. Each of them runs at eight per cent. for two years, and each of them *reserves to the debtor* the right to pay the debt and to stop the interest, before maturity, whenever he chooses.

At the time these mortgages were executed Melter was indebted to the Masonic Savings Bank in the sum of $11,436.04 of *overdue* debt. Of this sum $6,000 arose from Melter's dishonored note, then thirty-five days past due, and the balance was overdraft which had been standing for several months, and of which the bank had repeatedly made unsuccessful efforts to secure the payment. The mortgage taken in Krieger's name was really for the benefit of the bank, and that form for the transaction was adopted, for the reason that Krieger supposed the charter of the bank to forbid loans on any but first mortgages; and after the one mortgage had

been taken directly to the bank Melter had no unencumbered property left, and the device was resorted to of taking the second mortgage in Krieger's name.

The defendant, Jacob Krieger, and the bankrupt, Ben. Melter, were, of course, the principal witnesses. William Egelhoff, the nominal cashier of the bank, and brother-in-law of its president, testified also, and proved the bankrupt's account with the bank. The other witnesses are Harry Stucky, who proved the amount of the bankrupt's estate and of his debts, and his testimony is supplemented by an agreement of the parties, showing all deductions to be made from these debts; R. C. Davis, who was the lawyer of the bankrupt, and Samuel Russell, the lawyer of the bank; Henry Nettleroth and J. W. Henning, who, at the request of Krieger, on behalf of the bank, had made an estimate of Melter's real estate; S. S. Meddis, who had made a rough oral estimate of it at a previous time; and W. W. Gardner, the assignee's business partner, whose deposition is wholly irrelevant. Upon the appeal to the circuit court the parties agreed, in order to shorten the record, (1) that the Masonic Savings Bank has, under its charter, a lien for all debts owing to it by its stockholders; (2) that it is forbidden to loan money on mortgages, except on unencumbered real estate, worth double the amount loaned; (3) that the schedules show secured debts to the amount of $44,366, unsecured $23,525, and estimated assets $93,300. (Pr. rec. pp. 24, 25.)

We shall now state the leading facts in our case mainly from the testimony of the defendant, Krieger, with constant reference to the printed record.

And first of Melter's

Insolvency.

We have seen that Melter's secured debts are stated in his schedules at $44,366. (See agreement of counsel, pr. rec. p. 25.) The assignee speaks only of upward of forty thousand dollars including interest (*ib.* p. 52), and $2,000 taxes (*ib.* p. 51); the difference arising from his abandoning a recent purchase

made at a chancery sale. The unsecured debts proved ran up to $52,000, according to the evidence of the assignee, which is supplemented by an agreement of counsel, that setoffs and payments, amounting in the aggregate of $3,390, are to be deducted. (*Ib.* p. 17.) This makes the total of debts coming against the estate ninety thousand six hundred dollars ($90,600).

The houses and lots were estimated by Nettleroth and Henning, two experts chosen by the defendants a few days after the commencement of the bankruptcy proceedings, at $49,500 (see detailed list pr. rec. pp. 54–55); the choses in action brought in $2,000, the stock of groceries $3,500 (pr. rec. p. 51), making on this basis the whole estate $55,000. But considering the large amount of the preferred claims, very little could remain for the unsecured creditors. Mr. Krieger admits in his deposition (p. 70, *sub fine*) that they will get less than twenty-five per cent. It is therefore the case of a bad failure.

The assignee, however, states the entire value of the estate in his hands to be about fifty thousand dollars (pr. rec. p. 133), and as Melter is shown by the record to be a married man and a housekeeper with a family, deductions for homestead exemption and dower right have to be made. (Pr. rec. p. 124.) The value put upon the real estate by Henning and Nettleroth is as of the 30th day of May, 1877 (pr. rec. p. 55), the day on which the mortgages were executed. No material increase of Melter's indebtedness in the short interval between the date of the mortgages and the date of the bankruptcy proceedings is any where suggested in the record, or has ever been claimed by the defendants, and we think the foregoing more than demonstrates Melter's insolvency on the 28th of May, 1877.

Preference.

When an insolvent debtor turns over a large part of his assets to one creditor, so as to diminish the *pro rata* of all the others, he prefers him. As the law presumes that men intend the natural consequences of their acts, the "view to give a preference" is sufficiently proved, especially as the giving of

a mortgage is a deliberate act, and does not, like the payment of a note at maturity, arise in the ordinary course of the debtor's business. This court has, in Toof vs. Martin, 13 Wallace, laid down the following rule on this subject:

> It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case by a debtor of a large portion of his property while he is insolvent to one creditor, without making provision for an equal distribution, . . . necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is on him, etc.

This passage is almost literally reproduced in Wager vs. Hall, 16 Wallace, 602.

Was Melter so ignorant of his affairs as to believe himself solvent? Were his affairs such that he could reasonably expect to pay all his debts?

His answer to cross-question 17 (pr. rec. p. 32) gives the state of mind on the subject at the time of the execution of the mortgages, and it agrees exactly with what Krieger says as to the state of his own mind.

> Question. Did you not consider yourself abundantly solvent at that time?
>
> Answer. I considered it this way: If I could sell my property in the way that I wanted to, I considered myself solvent. I did not know otherwise. You knew where the property was. I did not know what the property would be sold for. You know how times is.

We have already shown that his property consisted mainly of houses and lots, and it appears at many points in the record that real estate at Louisville, as elsewhere, was then steadily falling.

The answer to "17th redirect" (on page 43) throws additional light upon the foregoing:

> Question 17. At the time you gave these mortgages did you know whether you would sell your property for enough to pay your debts?
>
> Answer. No, sir, I did not; I tried to. I offered a couple of houses for sale, and I thought at one time I had a man to buy it, but he backed out again, and I could not sell it. I tried to sell my ice and could not sell it.

In other words, Melter knew that he was only solvent if buyers should pay more for his property than experience had shown him they were willing to give.

This is insolvency, even in the popular sense of the word. Of his commercial insolvency he could not entertain a moment's doubt, for he could neither pay his note nor make up his overdraft in money; nor could he procure satisfactory indorsers. Hence, he could not help knowing his own insolvency; and he does not fall within the exception recognized by this court; but he is presumed to intend the natural results of his act, that is, he is presumed to have given and to have intended a preference.

And besides it needs no argument to show that the ignorance on the part of the debtor, which brings him within the exception made by the court must be an ignorance of *facts* and not merely erroneous *deductions* from facts in themselves perfectly well known. Doubtless, in the eye of the law a man is at all times, and for all purposes, held to have knowledge of all his debts that have been contracted immediately by himself in person. But whether this proposition be true or not in the breadth in which we have stated it, certainly it is sufficient for the purposes of this provision of the bankruptcy act, if the debtor knows of debts in excess of the value of his property as it would be rated by men of ordinary business capacity and discretion. Visionary and excessive estimates of the value of what a man knows to constitute his estate are not that "ignorance of his condition" which the law recognizes or excuses? The application of this principle to the Melter case will be shown presently.

Reasonable Cause.

And this brings us to that issue in the case which is generally the hardest for the complainant to maintain, and on which the battle was mainly fought in the two inferior courts before reaching this tribunal. If Melter was insolvent when he made the mortgages, if they were made by way of preferences to secure antecedent debts, it still remains to see whether the mortgagees had "reasonable cause to believe" that he was then insolvent.

(*a*) *Commercial Insolvency.*

We have shown above that on the 28th or 30th of May, 1877, Ben. Melter owned assets worth from $50,000 to $55,000, and owed over $90,000, and was therefore insolvent in the popular sense. Admit for the sake of argument that Mr. Krieger did not then know this fact. But Melter was also insolvent in the commercial sense. He was a merchant or trader, and had shown himself unable to pay his debts when they fell due in the way in which merchants pay their debts. He was insolvent in the sense given to the word by this court in four successive decisions. Of this Krieger had not merely reasonable grounds for belief, but he had the direct knowledge, for he had himself helped to impress this sort of insolvency upon Melter. About the 23d of April, 1877, Melter's note for $6,000 fell due at the Masonic Savings Bank. He had three days before reduced his overdraft by the sum of $2,000, paying $500 in cash and raising $1,500 on the name of George Philip Doern (see pr. rec. p. 89), who afterward paid it. (*Ib.* p. 18.) He could not pay the $6,000, nor any part of it. He brought along a new note with the same indorsers as the old one, which, in Mr. Krieger's absence, the book-keeper of the bank "*foolishly*" took, as Krieger says in his deposition (pr. rec. p. 72, side p. 191), but which he, as president, rejected because it was not in accordance with previous agreement, not having any new name on it. We have therefore the following state of fact: Thirty-five days before the date of the mortgage, Melter, a trader, is unable to pay a commercial debt of the highest dignity, a note payable in bank. It is true that very many merchants in good standing can not repay the money borrowed from the banks at maturity, but then they can do another thing—they can furnish satisfactory renewals. But this Melter could not do. This we have from Krieger's own mouth. Whatever he may in various passages of his deposition say about the apparent financial strength of Isert and Urschel, the old indorsers, one thing stands out preeminently, he will not take Melter's renewal note with those names alone, and Melter can not contrive any better paper; can

not find any "new name." To give either cash or notes with personal security, is the mercantile way to pay debts as they fall due; a man who can do neither is insolvent. It will not do to say that his having real estate to give for a pledge makes him apparently solvent, for, if he did not hold any thing of value there would have been no room for a preference. The condition of Melter with regard to this note is exactly that of the bankrupts in the four leading cases on commercial insolvency.

What is here said of the note may be also said of the overdraft. It had stood at $5,579.99 on the 24th of April, and was reduced only $143.95, namely, to the sum of $5,436.04 by the 30th of May, although Melter had been repeatedly urged to settle it up. An overdraft is a very ugly sort of a debt when the bank begins to complain about it. If the customer for thirty-six days consecutively shows his inability to diminish it by more than two and a half per cent., either by making cash deposits or by bringing satisfactory notes for discount, he avows his insolvency as much as if he allows his note to go to protest, and to lie over thereafter. A large overdraft existed from the first of the year, and was practically unreduced after March 1st, except by the Doern note and the one deposit of $500.

We might safely rest this branch of the case right here. Krieger's own refusal to accept the proffered renewal-note, Krieger's own demand that the overdrawn balance should be made good, stamped Melter with the badge of commercial insolvency, to Krieger's knowledge.

This court, in its opinion in the case of the Merchants National Bank vs. Cook, held proof of such knowledge on the part of the creditor to meet fully the requirement of the statute.

It is scarcely necessary to discuss the authorities as to the meaning of the words "having reasonable cause to believe the party to be insolvent." When the condition of the debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him insolvent. (95 U. S. p. 346.)

There is a very good reason why this court should have laid

down this standard of solvency for men engaged in active trade. Experience has shown that when such men are unable to meet their paper at maturity, either by cash payment or by satisfactory renewal, but are compelled to give up their assets for sale and to let the creditors wait for the proceeds, the losses are always so great as to sweep off more than the estimated surplus, even if upon a fair estimate the assets should exceed the liability.

. . . Under the system on which the general business of the country is transacted, the "credit" of a merchant or trader is as veritable and important a part of his capital as the actual money employed. For the merchant or trader to fail to pay or renew his debts in the ordinary course and methods of business as they mature, is, in the absence of explanations showing some temporary and merely incidental cause for it, the destruction of this credit; and the loss of this credit in the case of a merchant or trader should by all the requirements of reason and common sense be regarded as the equivalent of a fatally disastrous loss of actual money in the case of one not actively engaged in trade.

Creditors of traders are generally impatient; they press their claims in a race of diligence, and a stoppage always leads to failure, unless the holders of the demands agree upon an extension. But as delay may be as harmful to many of them as immediate loss, an extension is in itself nothing more than a case of insolvency, and has been so considered by this court.

Just as there is but one step from the prisons of kings to their graves, so there is but one step from commercial stoppage to failure and to twenty per cent. So when Krieger answers, "No. He was unable to pay so much cash, etc. etc.," he admits all that is necessary for our case.

Kreiger says (pr. rec. p. 76), in answer to redirect 12:

You knew that Melter was unable to pay his debts at maturity, prior to taking this mortgage.

Answer. No. He was unable to pay so much cash; but if he had sold his property at the time of the mortgages for what it could have been disposed of at private sale, I thought he could have paid every dollar that he owed and would have some money left.

(b) Krieger knew of Melter's Actual Insolvency.

In reading the depositions we must not forget that the body of the two mortgages and Melter's bank account are referred to, and may therefore be considered as parts of them, and even as the parts most worthy of belief. For a written paper is more retentive than any man's memory.

This court has already determined in the case last cited how such a deposition should be read. It is said there regarding the president of the Merchants National Bank, who had received a package of securities from the bankrupt Homans:

> The president of the bank testifies that there was nothing in the note sent with the securities, nor in the transaction itself, that led him to suspect the insolvency of Homans. While it is impossible certainly to indicate the operation of the human mind, we can not but think that the *witness is again at fault* in his recollection, and that his idea at the time of testifying was not the one that controlled his action when the occurrence took place.

That is, the court pays more attention to the undisputed facts, and to the inferences which can be drawn from them and the well-known course of business, and the equally well-known workings of the human mind, than to the mere assertion even of a highly respectable man as to his belief, knowledge, or opinion at some given time in the past.

At the date the mortgages were given Melter owed the Masonic Savings Bank about $34,000. In all of this debt, with the exception of less than $9,000 he was the principal debtor. (Pr. rec. pp. 168 and 173.) The debt in which he was surety was that of Immorde, his brother-in-law, and of Immorde's credit Krieger testifies that "It is only weak. He is entitled to credit. He is a hard-working man and is entitled to credit, but he is not entitled to get a credit of $8,500. I don't think I would advance him half that amount." (Pr. rec. p. 181.) In addition to this debt of $34,000 to the Masonic Savings Bank, or counting simply that on which Melter was principal debtor, about $25,000, there were, before the execution of the mortgages in controversy, liens and mortgages on Melter's real estate to the amount of about $20,000. Of these prior liens

and mortgages Krieger had full knowledge. Krieger says that "Melter said he had lien-notes on one of his Third-street houses in the chancery court. He bought the property and minor heirs had an interest in the property, and the notes became payable as soon as they became of age. I knew that to be a fact." . . .

Q. Don't you know that he made a loan of Mr. Coldewey for building purposes prior to the mortgages?

A. Yes, sir, but that only amounted to $7,000.

Q. You were aware of that fact?

A. Yes, sir. (Pr. rec. p. 185.)

And R. C. Davis, testifying of Krieger's knowledge of Melter's affairs at a later date (at which time, however, according to Krieger's own statement, he had learned nothing in respect to Melter's condition that he did not know prior to the execution of the mortgages), says:

Q. Krieger was very well informed about this mortgage on the property at that time, liens of the Western Bank and the Exner mortgage and the Korb liens?

A. He knew of the Western Bank and Exner mortgage and of the Korb liens.

Q. Knew of the vendor's lien and the others, and Dumesnil and Hunter Market-street property?

A. Yes, sir.

But conclusive evidence of his knowledge of these liens and mortgages is found in the fact that Krieger was compelled to accept for a part of his debt a *second* mortgage, a security condemned by the charter of the bank, and to obtain which he resorted to the device of becoming himself the mortgagee. There being no place left on Melter's estate for another *first* mortgage, he was compelled to resort to this course as the best that offered itself. But besides these mortgages and liens aggregating $20,000, and the $25,000 (excluding the Immorde debt), which Melter owed the bank, Krieger, prior to the execution of the mortgages, had knowledge of other debts of Melter's sufficient to make a total of $67,000. R. C. Davis says that at an interview which he held with Krieger, on the 4th of July, 1877,

Krieger had a statement or estimate, showing the amount of Melter's debts to be $67,000. (Pr. rec. p. 123.) A few weeks after this interview Melter, acting under the advice and influence of Krieger, executed a general deed of assignment to Krieger for the benefit of his creditors.

Krieger, in his deposition, is asked:

> Question. What did you learn in regard to Melter's condition, financially, between the date at which that assignment was executed and the date of the mortgage or mortgages, that you did not know prior to the execution of the mortgages? What new facts had come to your knowledge?
>
> Answer. I did not learn any new facts about his standing; but learned a few days before the assignment that parties had threatened to sue him.

Not only did Krieger, before taking his mortgages, know of indebtedness to the amount of $67,000, but he had the completest knowledge of the property of which Melter's estate consisted. He was repeatedly in Melter's store just prior to taking the mortgages, and therefore knew the quantity of stock he had there. Krieger knew the value of Melter's ice, to which such frequent reference is made. He speaks of it (pr. rec. p. 166) as worth several thousand dollars. Egelhoff, the cashier of the bank, who had been a sort of partner of Melter's in putting up the ice, says (pr. rec. p. 233) that he "did not think the ice would amount to more than $2,000, at the highest." Melter says there were one hundred and twenty-five tons of it. Krieger knew of every piece of Melter's real estate. He would not have evaded the provision of his charter with regard to loans on encumbered property without first ascertaining that no other alternative was left, and this implies a thorough inquiry at that time into Melter's real estate, provided he was not already in possession of the knowledge. But, in point of fact, his previous knowledge rendered such inquiry wholly unnecessary. Krieger (pr. rec. pp. 148, 49) testified as follows:

> Question. Was the McBride property on Main Street treated as part of the estate of Melter and taken into account in any way in your estimate of 1877?
>
> Answer. No, sir.

Q. Was the property on Third and Ormsby avenue, sold to Immordi, taken into account?

A. No, sir.

Q. When did Melter sell that property on Third and Ormsby Avenue to Immordi?

A. In 1876.

Q. You knew of the sale at the time it was made?

A. Yes, sir; I think so.

Q. Did you observe that S. S. Meddis, in the list filed with his deposition a few days ago, included a piece of property on Third and Oak streets?

A. I did not.

Q. Melter never owned any property there within your knowledge on Third and Oak streets?

A. I thought he owned that house on Ormsby Avenue, or Oak Street—a three-storied large brick building.

Q. This property you speak of as having thought Melter owned, it is the same he sold to Immordi?

A. I never thought Melter owned that property. I never considered that as Melter's property.

Q. You think Meddis made a mistake in estimating part of Melter's estate. The property on Third and Ormsby avenue which Melter had sold to Immordi?

A. If Meddis included that in his property he made a mistake. I didn't want to see the list of Meddis. I didn't want to know. I could have seen it if I had wanted to.

Q. You never knew of Melter owning property on Third and Oak streets?

A. No, sir.

And again (pr. rec. p. 177) he says:

I want to go further than that, and say that prior to taking the mortgages, I made an investigation of Melter's affairs, of all that I could learn. I had his real estate valued by Sim. Meddis. He stated to me the kind of property he had, and that Melter's property, etc., etc.

What then was the real value of Melter's estate, *all of which was known to Krieger*, as compared with the amount of debt of which Krieger had knowledge? As already stated, the assignee testifies that the entire value of the estate in his hands is about $50,000. This is without deductions for homestead and dower. Krieger in August, 1877, took an estimate of Melter's real estate from two experts, Henning and Nettleroth, whose depositions are in the record. The intelligence and

competency of these witnesses are fully demonstrated by the terms and manner of their testimony, and as they were experts of the defendants' own selection, will surely not be questioned by the defendants. Their valuation although made in August is as of May 30, 1877. (Pr. rec. p. 142.) They value the whole of Melter's real estate at $49,500, without deductions for homestead and dower. Taking, however, $50,000 as the true value simply of the real estate, and making no deductions, but adding the full value of ice, stock of groceries, etc. and choses in action, would still under the most liberal estimates, give the value of Melter's entire estate at less than $60,000. But Krieger, as long as he is left to speak in general terms, talks in the most swelling style of the large surplus that he believed Melter to have, and the great value of his real estate, etc. And Krieger seems to put especial emphasis on the valuation of Melter's real estate which he had Sim. Meddis make in January, 1877. This will be found on page 244 of the printed record. Krieger casually met Meddis in an eating-saloon and in "about five minutes' time" (pr. rec. p. 189) Meddis gave him "a rough and hurried estimate." Meddis included in his estimate a piece of property ($15,000) at Third and Oak streets, where Melter had never owned any property at all. (See Krieger as above quoted.) And if Meddis meant Third and Ormsby avenue, that was a piece of property which Melter had sold several years before, and which Krieger knew he had sold (pr. rec. p. 149), and on which Krieger held a mortgage from the then owner. (Pr. rec. p. 125.) . . . This reduces the estimate made by Meddis from $96,000 to $81,000. But he also includes the "Main-street property," on which nothing had been paid, and which the assignee abandoned, putting its value down at $7,000, though it had been lately purchased at only $5,500. Thus his estimate of the available real estate is brought down to the sum of $74,000, as of the 1st of January, 1877. But the following from Meddis's deposition is an almost outright corroboration of the estimate of Henning and Nettleroth:

Cr. 1. Do you know when Melter bought the various pieces of property which he owned in January, 1877?

A. No, sir; I don't know but one piece, that I sold him myself. I sold him that some time in the winter of 1866-'7, in the neighborhood of Twentieth and Market.

Cr. 2. Had not Melter owned most of the property—all, indeed, with trifling exceptions—which he held in January, 1877, for a number of years?

A. No, sir. I think that one piece of property that he had bought corner of First and Gray.

Cr. 3. Do you know what he gave for that?

A. Yes, sir; I think I know. He gave $2,900, with an old house on it.

Cr. 4. When did he buy that?

A. I think he bought that in 1876. I am not certain—1875 or 1876.

Cr. 5. Than that piece and the piece on Market that you sold him—had he not held the real estate for a number of years?

A. The major portion of it he had.

Cr. 6. What has been the history of real estate market in Louisville since the time at which Melter purchased his real estate which he held?

A. Some of the property that he held has gone very much higher than when he bought it, and then gone down again very much lower. A large portion of this property—the major portion—I suppose, he has owned through the period of real estate.

Cr. 7. Has there not been a decline in real estate in the city of Louisville within the last five years?

A. Yes, sir; a very marked decline in five years.

Cr. 8. And probably to what extent or average?

A. Well, sir, the average is at least fifty per cent.

Cr. 9. Do you consider that the property of Melter was affected by that decline, as other property in the city was?

A. Of necessity so.

True, Meddis says in this immediate connection, that he does not think the decline in this "*particular*" property has been near fifty per cent., but I think that is a kind of special pleading that will not commend itself very favorably to the court. Melter says that his real estate had cost him nearly one hundred thousand dollars, and applying the depreciation of "at least fifty per cent." with which Meddis says property in Louisville was generally affected, would most strikingly confirm the estimate of Henning and Nettleroth. But the plain fact is that Krieger himself, when called on for a valuation *in detail* of Melter's real estate, only ventures in two instances to name a greater price than was fixed by Henning and Nettleroth. Here is his estimate.

Q. Have you seen a copy of the estimate filed by Henning?

A. Yes, sir; a few minutes ago.

Q. Are you familiar with Melter's property, and with the values of real estate generally in the city?

A. I am.

Q. What do you think of that estimate? Give your opinion in detail.

A. The property on the southwest corner of First and Gray streets, valued at $8,000, I think would bring more to-day under the hammer, and would certainly, at $8,000, be a first-class investment. The second piece of property, valued at $12,000, situated on the southwest corner of Second and Breckinridge, I think that property to-day would bring $12,000, and also would be a first-class investment for any body to buy and rent it out. The third piece of property is on the corner of Third and Breckinridge streets; there's a store-house, an ice-house, and feed-store in the rear; it is valued at $10,000; which I think it would bring more to-day, and which Melter himself, about two months ago, thought would bring $15,000. The next piece of property, marked here No. 2, a dwelling-house on Third Street, near Breckinridge, valued at $5,000; the next house adjoining is also valued at $5,000. These pieces I think ridiculously low, as they would bring over $6,000 this day apiece. The next are two houses on Breckinridge Street east of the store-house, double house, each one valued at $4,000, which I think would bring more at auction this day, and would pay a good profit as an investment for any purchaser. Fourth, a lot 30 by 100 feet, north side of Market Street, near Twenty-first, at $750; that I think cost Melter much more money than that, but which will scarcely bring more than that now. The next one is valued at $950, being a lot 95x60, on the west side of Twenty-first; that would scarcely bring more to-day, but would be a good purchase. The next lot, on Dumesnil and Twelfth streets, an ice-house 40x156¼, valued at $600; I think the deed will show Melter paid for the vacant lot $600 to Dumesnil. I think the two ice-houses cost Melter $1,400 to build them.

To say that the property "at the price named would be a first-class investment," and "would bring more," without putting any price on it, is equivalent to saying nothing. Giving Krieger the benefit of these higher estimates, so far as he makes any, we still have the estate much below $67,000, the amount of debt of which Krieger knew. As bearing on the proper way of treating and estimating Melter's real estate, and its true relation to his embarrassed condition at the time these mortgages were given, it is important to notice that Krieger himself declares Melter's real estate transactions to have been the cause of his failure. (Pr. rec. p. 171.)

Q. What made the execution of the mortgage necessary or desirable at this time?

A. I think Mr. Melter, through building houses, had made his available means too short for carrying on his usual business. He built a house, corner of First and Gray, which, I think, took some eight or nine thousand dollars cash money out of his usual business-capital, and building houses the year before, or two years before—I don't know exactly the time—on Second and Breckinridge, which took some $18,000 out of his business. I think those two things were the cause of his failure — proved to be. We did not think so at the time.

And now the only answer of the defendants to all this, when duly analyzed, is that the estate of Melter, or more accurately the real estate of Melter, was worth much more in the mind or mere opinion of Krieger than in fact on the market. Krieger chose to consider the estate worth an unreasonable, fictitious, and absurd value. Are the rights of other people to be determined by the opinion that he says he in fact entertained, or by what as a man of ordinary business capacity and prudence he should have thought and believed. He knew of $67,000 of debts, and if he had put the estimate of a man of ordinary prudence and capacity on Metler's estate, he would have known it was worth considerably less than $60,000. It is worse than superfluous to cite authorities to the point that the belief actually entertained is wholly immaterial. It is altogether a question as to what to a man of average prudence and discretion there was reasonable cause to believe. "The question raised by the statute is not his actual belief, but what he has reasonable cause to believe." (Walbrun vs. Babbitt, 16 Wall. 582.) "Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it should appear that the respondents actually believed that the mortgagor was insolvent; but the true inquiry is, whether they, as business men, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them, at the time the conveyance was made." (Wager vs. Hall, 16 Wall. 601.) But it will certainly be interesting and possibly important to show by citations from the depositions in the record, how minute and thorough Krieger's knowledge of Melter's business really was. We do not claim that Krieger knew

the whole of Melter's indebtedness, but we do show a very extensive acquaintance with the subject.

We have already quoted Krieger's statement that before taking the mortgages he "made an investigation of Melter's affairs, of all that he could learn." (Pr. rec. p. 177.)

On p. 196, pr. rec. this is found in Krieger's deposition:

Cr. 15. Did you have any reason to believe that Melter was insolvent at the time the mortgage was taken by the bank?

A. None whatever.

Cr. 16. Did you have any reason to believe him insolvent at the time the mortgage was given to you, and you indorsed the note?

A. None whatever.

Cr. 17. Did you then believe him perfectly solvent?

A. I thought so.

Cr. 18. Did you think that he had a large and considerable surplus?

A. I though that he had considerable.

Cr. 19. That was after investigation?

A. Yes, sir.

Melter testifies as follows on this subject:

Cr. 61. What was the amount of your debts at the time you went into bankruptcy.

A. I don't know. Krieger knows better than I do. I knew afterward, but not at that time. I found it out afterward.

Cr. 62. How much were they?

A. I think they have got it on the record. I don't know exactly. I know Krieger told me one day—on the 4th of July—it was about sixty four thousand dollars. That was on the 4th of July, 1877. He told me before I made the assignment it was $64,000. He told me and Major Davis in the bank together. I did not know at that time that it was that high.

Cr. 142. How did Mr. Krieger come to know the amount of your debts better than you did, unless you had given them to him?

A. I never gave them to him, as close as he knows it.

Cr. 143 Do you, before making any financial transaction whatever, always go to Mr. Krieger and tell him that you expected to make such a transaction, and the amount that would be involved in the transaction?

A. Not always.

Cr. 144. How did he know better than you your financial condition?

A. Because he inquired.

Cr. 145. Didn't you give him the information?

A. Not always; he inquired outside.

Cr. 146. Do you mean to say that he could learn more of your financial condition from others than even you, yourself, *you*?

A. I think he did.

And Major Davis, Melter's attorney, testifying of conversations with Krieger at a time when Krieger admits he had knowledge of no new facts that he did not know when the mortgages were taken, says (pr. rec. pp. 118, 126, and 127):

Q. What knowledge of Melter's affairs and what familiarity did Krieger have at that time?

A. He had an estimate, as I said before, and spoke of one or two matters that I had not estimated myself in Melter's indebtedness, although I had been figuring on the matter. My resources of getting a knowledge of Melter's condition were mainly from himself, that is, his indebtedness, and a good many debts he left out; Krieger spoke of one or two, but I don't remember whose debts. He spoke of one or two that Melter had not spoken of.

Q. Did Krieger appear to have a familiarity with Melter's business and estate?

A. He had a greater familiarity with the amount of the indebtedness of Melter than I did, because he spoke of one or two debts. I am sure he spoke of one debt that I had not myself.

Q. Did Krieger have a conversation with you after having succeeded in getting the mortgage?

A. I had a conversation with Krieger in regard to Melter's condition, and with regard to making Melter a further loan on his property.

Q. That was some time between the mortgage was given and the 4th of July?

A. Yes, sir.

Q. Was the statement of Melter's indebtedness that Krieger had on the 4th of July a detailed statement?

(Objected to.)

A. Well, he had a good many; I don't know what you call a detailed statement. He had a statement of the amount owing Melter's creditors.

Q. Merchandise and bank paper?

A. Yes, sir.

Q. You don't know how he got them?

A. No; but I know he had them.

Q. You don't know long he had them?

A. No, sir.

Q. He seemed to be more familiar with the indebtedness than you did?

A. Yes, sir.

Q. And seemed perfectly familiar with the property at the interview you had?

A. Yes, sir; knew of his real estate.

Is not Krieger's admission that, without any additional knowledge of Melter's condition, except that suits were threatened, he advised Melter to make a general assignment

for the benefit of his creditors and became the grantee in such a deed, fatal to the mortgages? Does not a creditor, who knows enough of his debtor's condition to feel that a general assignment is called for by the exigencies of the case, know enough to preclude him from absorbing the debtor's estate by mortgages in security of his own debts? (Krieger's dep. pr. rec. p. 176.)

Q. Did he advise with you as to whether he should make an assignment?

A. He advised with me some, but I was not his adviser altogether —that I heard of by rumor.

Q. Did you approve of his course in making the assignment?

A. I did. . . .

Q. What did you learn in regard to Melter's condition, financially, between the date at which that assignment was executed and the date of the mortgage or mortgages that you did not know prior to the execution of the mortgages; what new facts had come to your knowledge?

A. I did not learn any new facts about his standing, but learned a few days before he made the assignment that parties had threatened to sue him.

But several weeks before the assignment was made, his own debts being now secured, but being otherwise without any new light on the subject, Krieger comes to the conclusion that Melter's condition is hopeless.

Major Davis says again, in reference to the interview of July 4 (pr. rec. 117):

Q. Did Krieger express any opinion of Melter's condition at that time?

A. The conversation was in regard to saving Melter and getting him out of his trouble. I don't remember distinctly what expression he gave, but the impression left on my mind was that he thought Melter was in a pretty bad way.

(Ans. objected to.)

Q. Will you give or repeat, as nearly as you are able, what Krieger said on that subject?

A. I don't know that I can give Krieger's language on that occasion. There was a good deal of the conversation pro and con. in regard to Melter's condition, and the probability of being able to save him from bankruptcy, and of making his estate pay out.

Q. Did Krieger express any opinion of the probability of making the estate pay out?

A. He thought it was a matter of some doubt as to his ability to make the estate pay out.

(*c*) *The Mortgages were Really Coerced from Melter.*

Melter's evidence, which is wholly uncontradicted, is as follows:

Q. 2. How did it come that you executed on the 28th of May, 1877, the two mortgages that are in controversy in this case—one to Jacob Krieger, sr., and one to the Masonic Savings Bank?

A. Mr. Krieger asked me for it at the counter. He threatened to sue me, and that is why I gave him the mortgages.

Q. 8. Did you execute those mortgages willingly?

A. No, not exactly.

Q. 9. State what your feeling about that was.

A. My feeling at the time was that I would get out without giving any mortgages, because I had a great deal of money invested in ice, and I offered some of my houses for sale—that is, the one Mr. Miller lives in, and I told Mr. Krieger the time before that I thought I could pay him the money, but in the meantime Mr. Krieger got sort of anxious about the thing. He came out twice on Sundays; he came out once on a week day, and he says to me, "Mr. Melter, this thing has to be settled." He stood at my bar and took a drink and a cigar—he stopped there. I said, "Mr. Krieger, I am doing all that I can to settle this; I want to sell my ice; you know that I have got the ice, and I want to sell my property to get out of this debt." I think it was during April or May, say about the 25th of May, so far as I can recollect, I stepped into the bank; previous to that when I came to the bank he always asked me for that account, to settle the matter, and previous to that when he came out to my house. This day I came to the bank—I think it was the 25th—and Mr. Krieger called me; I think there was a great many people in the bank, which is always the case; I came there about ten or eleven o'clock. I think Mr. Krieger saw me. He was sitting inside at his desk on a chair. He said: "Mr. Melter, before you go I want to see you." I said, 'All right." I stepped inside the bank after I got through. I had some kind of business to do, I don't know what it was; when I stepped in and sat down along side of him, Mr. Krieger told me, "Mr. Melter, this story has been long enough, now;" says he, "You promised from day to day to pay, and settle this matter;" and, says he, "It is only a few days now, and we are going to bring suit against you." It struck me—I thought Krieger was a friend of mine—it struck me, and I said, "Krieger, what have I to do?" Says I, "I can not sell my property at the present time, which I have tried to do; I can not sell my ice; what shall I do?" He said, "Give me a mortgage." That is the first I ever heard about a mortgage. I said, "What mortgage do you want?" He commenced setting figures down. He says, "You owe Mr. Coldewey $7,000 mortgage;" I said, "Yes, I do." Says he, "You owe $5,000 to Adam Exner, on the corner of Third and Breckinridge;" I said, "Yes, sir." Says he, "You don't owe any thing on the house you are living in." I said, "No, sir." He said something about indorsing for some body. He knew a great deal of my affairs.

I indorsed for Philip Doern; and he said, "Don't do it any more." That is the remark that he made; I indorsed for Philip Doern, $300; I says, "What do you want now?" I could not help myself, I was in trouble and did not want to be sued; and I asked Krieger, "What do you want now?" He says, "Give me half of it of the house corner of Third and Breckinridge, and give me the other half where you live in." I said, "All right." It was either—I could not say exactly, but that was either Friday or Saturday, I think it was either Friday or Saturday. I went home, and didn't talk to my wife about it at the time; so, on Sunday morning, about nine o'clock, Mr. Krieger came to my house, and came into my bar-room and took a drink, and he says, "Mr. Melter, I want them papers." I said, "What papers do you want?" He said, "I want the papers from your house on the corner of Third and Breckinridge, and I want the papers from your house where you live in." That was the papers. I bought the ground from T. L. Jefferson, and bought the other from T. L. Nicholson. I had to give him the papers. I took all my papers out and gave him those two deeds. That was on Sunday morning; and he went off. On the 28th day—I think it was on Monday—I don't know; but on the 28th the mortgage was signed.

Int. 20. How many times did Mr. Krieger call on you for a settlement of your indebtedness before the execution of the mortgages.

A. At least about a dozen times; I don't know exactly, but at least about that.

Int. 21. How often did he say any thing about suing you.

A. Only once.

Int. 22. When was that?

A. That was the time we talked about the mortgages.

Int. 23. Did he give any reason why the thing had to be fixed up?

A. No, Sir; he said the directors of the bank would not let it go any longer and that he was bound to do something about it. He told me that previous to that time—half a dozen times—that the directors of the bank were kicking about it, and they would not allow it to go any longer.

The following is from the deposition of Egelhoff:

Cr. 71. Do you know any thing of Mr. Krieger calling on Mr. Melter at his house?

A. I remember something of that kind; that Mr. Krieger went there, but I don't remember what the result was, or what he went for.

Cr. 72. What enabled you to remember the fact of his having went there. What knowledge had you of it at that time?

A. Because I knew that he had been there, and that he was going there. He said so.

Cr. 73. At what time was it that he made that call?

A. I think it was during his sickness and then once or twice afterward. I remember that he went several times; that he said he was going out there.

Cr. 74. Do you know for what purpose he made any of those calls on Melter?

A. I think he went there on account of business with the bank.

Cr. 75. On account of the condition of Melter's account with the bank?

A. I don't know that he went for that particular purpose.

Cr. 76. Explain, then, what you mean by your answer to the question before the last.

A. His business with the bank; his deposit account and discount and overdraft account. That is all connected with the business of the bank. I don't know which he went for.

Cr. 80. What did Mr. Krieger say when you first heard him speak of it?

A. I could not remember that.

Cr. 81. Could you remember any thing that he said on the subject at that time?

A. Only that I know that Mr. Krieger always assured us that the account would be made good. I suppose that he was alluding to the mortgages that *that* he was to get from him.

Cr. 82. Who do you mean when you say that "Mr. Krieger assured us" that the account would be made good?

A. Well, the people at the office; myself principally.

Cr. 83. Do you remember the time at which you first heard Mr. Krieger make that statement, that the account would be made good with a mortgage?

A. I don't remember whether he said that, "being made good by mortgage" or not, but being made good by arrangement with Mr. Melter one way or another.

Was the Consideration for the Krieger Mortgage Contemporaneous?

Krieger claims in his answer that the consideration for the mortgage to him was a liability for Melter, assumed simultaneously with the execution of the mortgage. If this were true, of course as to that mortgage no question of preference could be urged. The real origin of the debt, and the nature of Krieger's so-called liability, has been already briefly stated. More at length it is as follows:

It is admitted that on the 28th and 30th of May, 1877, Melter owed to the Masonic Savings Bank $11,436.04 of unsecured overdraft (see schedule on p. 89, pr. rec.); that the two mortgages, each of $6,000, were taken to secure this debt; one of the two was taken in the name of Krieger—but this was by his own statement (pr. rec. p. 62, side-page 162) only a matter of form, brought about as already explained, by a provision in the charter, which forbids the bank from making loans secured by liens on any but unencumbered real estate. And so he, as the

president and largest stockholder of the bank, took Melter's note to himself secured by a *second* mortgage, and indorsed this note to the bank. To call this a simultaneous loan, to deny that this is a new security for an old debt, is a position which, in this court, it is not worth while to refute; it refutes itself. If such a slight change in the position of parties could be viewed as a new loan rather than as a preference, a ready means would exist to avoid the provisions of every law forbidding preferences, without the least exertion of ingenuity, whenever the creditor could find a single friend, even a man of straw, to receive and to indorse proffered securities. We hardly think that the point will be insisted on by the appellees, especially as it was passed upon by this court in Toof vs. Martin, and again in Walbrun vs. Babbitt, 16 Wall. 577.

Krieger's name was not inserted in the note, nor was it indorsed by him, at Melter's request, or for Melter's benefit. It was Krieger's voluntary action, *acting in behalf of the bank*, because he supposed that course was necessary to secure to the bank the benefit of the mortgage, a *second* mortgage, which he was seeking for it. To talk of this as a liability *assumed for Melter* is preposterous. Krieger is really under no liability whatever to the bank, and he took and holds the note and mortgage as trustee for the bank.

Fraud on the Bankrupt Law.

It remains to be seen, whether on the 28th and 30th of May, 1877, Jacob Krieger "knew," in the language of the amended act, "that the deeds of mortgage were made in fraud of the laws of the United States, on the subject of bankruptcy." Of course if we have succeeded in satisfying your Honors that he "*knew*" of Melter's insolvency, there will be no difficulty on the point we are now considering. But if we concede that he only had "*reasonable cause to believe*" Melter insolvent, what then will amount to knowledge of the intended fraud?

Only one decision has been rendered by this court on the meaning of the word "knew," inserted by the amendatory act of 1874 in the 35th section, and hardly more than one perti-

nent decision of an inferior court can be found in print. The former is Rogers vs. Palmer, 102 U. S. p. 266; the latter by Judge Deady, Webb vs. Sachs, is found in vol. 15, p. 173 of the N. B. Register. We copy from the opinion of this court (p. 266, bottom of page):

> This latter statute carefully introduces the word *know* instead of *reasonable ground to believe*, in regard to the purpose to commit a fraud on the act. We have little difficulty in coming to the conclusion that the elder Palmer had reason to believe that his son was insolvent at the time judgment against him was taken and the execution levied. We have already given the reasons for this, etc. It is a little more difficult to say that the father *knew* that the goods were seized with intent to defraud the bankrupt law. Possibly, at the moment of the seizure, he did not know personally all that his son and his attorneys had done, nor all that they knew. It may be that he supposed his suit would proceed in regular order without the aid of his son, or any act of his attorneys intended to evade the bankrupt law. . . . But this can not be said of the attorneys who represented him. . . . These attorneys also procured the debtors to make the affidavit in the injunction suit, with the perfect knowledge that if they thereby succeeded in dissolving it, their client would seize the goods, and make his debt in preference to all other creditors. . . . They therefore knew and intended that their action in behalf of their client would work a fraud upon the bankrupt law. Is this knowledge imputable to the appellee in this case?"

Your Honors proceeded, while practically overruling Hoover vs. West, to decide that the attorney's knowledge was imputable to his client, and reversing the judgment of the circuit court, made the preferred creditor account for and restore the proceeds of the levy. But in discussing whether or not the attorney had the "knowledge" contemplated by the amended bankrupt law, your Honors never inquired whether he *knew* of the debtor's insolvency. It was simply this: Did this attorney know that this levy would work an unlawful preference, *provided* young Palmer is insolvent? If he has also reasonable cause to believe him insolvent, then this conditional knowledge, when joined to this "reasonable cause," makes out the case for the complainant under the amended act. The only supposition made in the above passage from the opinion that the preferred creditor might not have known of the fraud on the bankrupt law, was that he might not have known the way in which the

preference was obtained; that he might not have known of the debtor's co-operation.

In our case the defendant, the bank, acted not through an attorney, but through its president. His knowledge is, of course, the knowledge of the corporation. (Merchants Nat'l Bank vs. Cook.) He knew that the mortgages were intended to secure his bank in full; he knew that they were given by the debtor, though under pressure, yet with that intent; in short, that they were intended to defeat, to that extent, the operation of the bankrupt law.

We have referred above to the peculiar form of the mortgages, which gave to the debtor the right to redeem them at any moment. It follows that the theory of the defense, by which these mortgages were taken by the bank in the ordinary course of its own business, for its "savings department" is altogether untenable, and that security for an antecedent debt—that is, a greater share in the distribution of the bankrupt's estate than the policy of the law vouchsafed to any one creditor, in short, that a fraud upon the bankrupt law must have been the only purpose of the bank officers in taking the mortgages.

It is not quite clear what the object of Congress was in either the original or amendatory act, in requiring that the creditor, in order to lose his preference, must have "known," or must have had cause to believe "that *a fraud on the bankrupt law was intended,*" in addition to his knowledge or good "cause to believe that the debtor was insolvent." The object was certainly not to protect such creditors as happened to be unacquainted with the provisions of the bankrupt law, and to break down the well-known maxim *ignorantia juris nocet.* "Every one is presumed to know the law." Judge Deady of Oregon, in his charge to the jury in Webb, ass'ee vs. Sachs, holds that the known intent of fraud against the bankrupt law must be presumed where a preference is given by a debtor of whose insolvency the creditor is advised. Yet this presumption may be controverted. For instance, the creditor may believe that he holds the only unsecured demand upon the insolvent debtor.

When this is the case, though he may have the fullest knowledge of the fact of insolvency, he can not know that a fraud upon the bankrupt law is intended. He may, in such a case, take a mortgage or other security merely to prevent the debtor from wasting his estate or from withdrawing it from the creditor's pursuit.

But such a defense can not be made by the appellees in the case at bar. The officers of the Masonic Savings Bank knew of demands upon Melter that were not secured, and in which other persons were interested. It is stated that he owed to the bank, including $8,500 for which he stood surety for Immorde, and including $12,000 in question, over thirty-four thousand dollars. This leaves between thirteen and fourteen thousand dollars in notes held by the bank, in which Melter was principal, and for which other fully solvent parties were sureties or indorsers. Of these demands Krieger knew; he knew that the men bound with Melter on these notes would be defrauded of their rights by the operation of the preference given to the bank.

So it must have often happened, that a sale of goods, even in the usual course of the debtor's business, and oftener yet, that an ordinary payment of commercial paper at maturity was made by an insolvent debtor to one of his creditors who had reasonable cause to believe in the man's insolvency. But he might co-operate in the sale, not with the design of securing himself at the expense of others, but because he needed the goods and got them at a cheap price; and he would not refuse the payment made to him through his banker, because he could not do so without causing an explosion, or without releasing indorsers, or without ruining his own credit.

Thus it appears that notwithstanding the presumption that every one "knows" the natural effects of his acts, a great many cases might occur in which a creditor, though knowing the insolvency of his debtor, would not know that a transfer working as a preference was intended in fraud of the bankrupt law. But section 5130 of the Revised Statutes, copied from the last clause of section 35 of the old act, and which is neither repealed nor abridged by the amendments of June, 1874, provides, "If

such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* proof of fraud." And this clause has been strictly enforced by this court in Wallbrun vs. Babbitt, 16 Wallace, 577, a case otherwise differing very widely from our own. Now, we maintain that it was not Melter's usual and ordinary course of business to give mortgages for antecedent debts. It is not, to our knowledge, in the course of any body's business to do so, and so the *prima facie* case of fraud would always arise when a mortgage for an antecedent debt is taken from a debtor, with reasonable cause to believe him insolvent. In fact both Judge Deady in Webb vs. Sachs, and this court in Rogers vs. Palmer, work out a similar presumption even without the aid of this clause. But if this position be thought to be too broad (which we by no means admit), the giving of such mortgages as those found in our record, *redeemable at the debtor's pleasure* at any time, are not only out of the usual course of the debtor's business, but also out of that of the creditor's. There can be no investment in such a case. The debtor obtains the advantage of paying whenever he pleases within two years simply through the badness of his credit. It was a kind of business on Melter's part which he could only do because he was expected to fail. The only motive of the forbearance was the intended fraud upon the bankrupt law.

Grant vs. National Bank.

The defendants below relied mainly on the authority of Grant, assignee of Miller, against the First National Bank of Monmouth, on appeal from the Circuit Court for the Northern District of Illinois, reported in 7 Otto, and will most probably rest upon that case their main arguments in this court. Judge Ballard closes his opinion thus: "If the Supreme Court in the case of Grant vs. First National Bank means to change the rule announced in Toof vs. Martin, and solemnly reannounced in three subsequent cases, it has not said so, and I shall adhere to the old rule until it shall be distinctly abrogated. I do not, however, believe that there was any purpose to change it." (Pr.

rec. p. 23.) He points out the leading differences between the facts in that case and in the case at bar, as well as he can without access to the record of the former, and with nothing but the statement of facts in the opinion to guide him. We have since obtained a copy of the printed record in the Illinois case, and used it in the preparation of our argument. It is of course easily accessible to your Honors. It may be remarked that the opinion in it was first published in the May number of the National Bankruptcy Register for 1878, *shortly before the preparation of the evidence in the case at bar.*

In both cases, in that from Illinois and in our own, the mortgages assailed as unlawful preferences had been given by the bankrupt to the bank with which he dealt, partly for overdrafts, partly for a loan by note. In both cases the question arose, Had the officers of the bank reasonable cause to believe that the customer was insolvent? This is purely a question of fact, and the circumstances bearing upon it can not well be the same in any two cases. Your Honors did not hold, in the Illinois case, that a bank, during the reign of the bankrupt law, had any greater right to prefer itself by mortgage against loss from its customers, than an individual money-lender or other creditor. You only decided that grounds for mere suspicion do not constitute "reasonable cause to believe," within the words of the statute, and you further decided as a matter of fact on the evidence before you that Lafferty and Hubbard, the president and cashier of the First National Bank of Monmouth, had not, on the 16th September, 1871, reasonable cause to believe, that John S. Miller was then insolvent. We can not see how this decision can be called in as a precedent to show that Jacob Krieger, sr., and Wm. Egelhoff, the president and cashier of the Masonic Savings Bank, had not, on the 28th or 30th of May, 1877, reasonable cause to believe that Ben. Melter was then insolvent.

When your Honors, in Barbour vs. Priest, 103 U. S. p. 293, approved the doctrine of the Illinois case, you confined it expressly to this point, that grounds for mere suspicion are not equivalent to a "reasonable cause to believe," just as we state

it above. The purport of the opinion in the last-named case—Barbour vs. Priest—can not help to extend the bearing of the former precedent in favor of the defendants, for your Honors seemed to think upon the evidence that Mrs. Barbour, the preferred creditor in that case, had not even grounds for suspecting the insolvency of Colby, the bankrupt, at the time when he executed a mortgage to her without any solicitation. The only new point really decided in Barbour vs. Priest is this, that the burden of proof on the issue of the creditors having "reasonable cause to believe" rests on the complainant. The order in which the evidence in this case was adduced in the court below shows that the complainant was not afraid to assume, and did assume, the burden of proof on this as well as on the other issues.

The obvious and controlling distinction between the case at bar and the Illinois case lies in the difference in the relations which the officers of the Monmouth bank sustained to Miller from those subsisting between Krieger and Melter. In the latter case we have seen that Krieger assumed a sort of guardianship over Melter, and claimed to know more of his business than Melter knew himself. The extracts from the evidence heretofore made abundantly prove this. It will be seen that he warned Melter against indorsing for others, and drew to his attention a $300 indorsement which he had made for one Doern, who in his turn indorsed for Melter. We have Krieger counselling Melter to make an assignment in trust for his creditors, and having himself selected as the assignee. The cashier of the bank pays off Melter's hands in the ice business apparently without any request from Melter, and possibly even without his knowledge. There is no suggestion in the record of the Illinois case of confidential and intimate relations between Miller and the officers of the bank. The record of the case shows that the full extent of the *actual knowledge* they had of Miller's indebtedness was limited to the debt due the bank and the loans Miller had made through Hubbard. The case turned altogether upon the actual knowledge and the means of knowledge in relation to Miller's business and condition possessed by the of-

ficers of the bank, and the radical difference in facts completely defeat any real analogy between that case and this. The $10,000 of Miller's debt of which the officers of the bank had knowledge, was not more than about half of the admitted value of his estate. Both Miller and Wallace testify that they estimated Miller's indebtedness at the date of the mortgage at about seventeen thousand dollars, but each says that he did not disclose that fact to the officers of the bank. The bank knowing Miller to be in debt $10,000, and knowing that he had property worth approximately $20,000, accepted a mortgage from him for $6,000. Krieger knowing Melter to be indebted $67,000, and knowing that he owned property which any man of ordinary prudence and intelligence could not have estimated at as much as $60,000, coerced a mortgage from him for $12,000. Miller's farm, comprising about two thirds of his estate, was unencumbered. Melter's real estate, comprising nine tenths of his whole estate was known by Krieger to be so encumbered that they must, by device and indirection procure a security denounced by their charter as unsafe.

And in connection with this subject it is worth remarking that the opinion in Barbour vs. Priest notes as a most important circumstance in Mrs. Barbour's favor the fact that she did not know that there were mortgages on Colby's property. And in Wager vs. Hall, 6 Wall. 603, knowledge of a previous mortgage, together with the non-payment of the creditor's own demand, was held to constitute "reasonable cause to believe," etc. The element of commercial insolvency is wholly lacking in the Miller case. In the present case it was complete and flagrant. Miller's debt consisted of a note having yet forty days to run, and an overdraft of $2,000, no part of which had run a month, and which at times in the meanwhile was not more than $500. Melter's debt consisted of a large overdraft and a note thirty-five days overdue, and which Melter had tried in vain to renew, and his renewal of which as tendered by him had been refused and rejected by the bank, Krieger denominating as "foolish" the book-keeper's provisional acceptance of it. There had been no request to Miller for the payment of his

overdraft until at most the day before, possibly not until the very day the mortgage was executed. Melter's overdraft of nearly six thousand dollars had stood practically unreduced for six weeks, although its payment had been most urgently pressed by Krieger, both through repeated calls at Melter's place of business and finally by threats of suit.

According to the four times repeated decision of this court, whenever a merchant or trader can not meet his debts as they mature in the ordinary course of business he is insolvent. Melter was a regular merchant doing business in a city of over one hundred thousand inhabitants. A very different standard should be applied to him from that which was proper in Miller's case. The protest of Miller's checks did not affect his credit. The First National dishonored his check, and in a fit of temper he goes to the Monmouth National and secures without difficulty a line of credit on overdrafts up to eight thousand dollars or nine thousand dollars. The Monmouth National in its turn after a few months refuses his check, and he is again angry and goes back to the First National and is there afforded his former credit. The dishonor of Melter's check, on the contrary, was most disastrous to his credit. He says (pr. sec. p. 87):

> I gave a check on the 13th and it was dated the 15th, and he refused my check, and that is where all the trouble came from.
>
> Q. What do you mean by that it is that that all the trouble came from?
>
> A. In the first place, C. Henry Finck went all around town saying that my check was not paid on the Masonic Savings Bank, and he went around afterward in the court-house asking if I did not make an assignment already. Such rumors came altogether from the refusal of that check.

Some Incidental Questions.

There was in the early stages of the case some feeble pretense that Melter's overdraft had been permitted under a promise on his part to give a mortgage to secure the bank in its repayment. This claim, however, has at no time been insisted upon in the arguments in the lower courts, and is virtually abandoned even before the close of Krieger's own deposition. The bankrupt repeatedly and strenuously denies it, and a glance

at his account effectually disposes of the subterfuge. For outside of the six thousand dollar note which becomes part of the overdraft on the 25th of April, the balance against Melter steadily decreases from $7,640.70 on the 15th of April to $5,436.04 on the 23d of May, not to change from that day until the creating of the mortgage discount on the 30th of that month. As far back as the 14th of March—that is, two months and a half before the mortgages were given—the overdraft was as large as on that day, and there was no time from January 1st when the overdraft did not amount to from three thousand to seven thousand dollars.

Krieger in his deposition makes these statements on this subject:

Q. When was the arrangement or understanding made with Melter with regard to the execution of the two mortgages?

A. The understanding was some three or four weeks before the mortgages were actually executed; the date I can not give you, because I did not take any account about it.

Q. Was that arrangement with Melter for the execution of the mortgage made as early as the 1st of May?

A. I think it was. I know that it was made several weeks before.

Q. Have you any means of determining the time at which it was first understood that he was to give a mortgage?

A. I have no means of finding the exact date.

Q. Would you be willing to state that it was earlier than the first of May?

A. I would not like to state the time. It may have been over a week before that time.

Having in this explicit manner fixed the date of the agreement as three or four weeks before the mortgages were actually executed, and that on the trustworthy basis of the *interval between the events*, and there having been an adjournment of the deposition over night, he came back the next day, and in answer to a question from his own attorney says the "the first suggestion or discussion of the mortgage was as early as January or February; that he agreed to sell some property or sell ice or give us a mortgage." Now we submit that considering the importance of the subject this is rather too contradictory and miscellaneous to be given any weight or credit.

Melter's testimony is copied in full:

Q. Did you, at the time those mortgages were executed, obtain any money from Jacob Krieger, sr., or the Masonic Saving Bank?

A. Not a cent.

Q. 4. Did you have any arrangement or understanding with Mr. Krieger at that time to furnish you any sum of money on the execution of those mortgages?

A. I did not. It was the understanding when he asked me for the mortgages to include what I owed the bank and the check what was laying over.

Q. 5. How long before the mortgages were actually executed was the first discussion or suggestion of that matter between you and Krieger? How long was the first talk before the mortgages were made?

A. About three days.

Int. 11. Did you ever at any time get any money from Mr. Krieger, or the Masonic Savings Bank, under the promise to execute a mortgage to secure him?

A. I did not.

Int. 18. Did you overdraw your account at the bank at the time, under a promise to give Mr. Krieger or the bank a mortgage to secure the overdraft?

A. No, sir.

Int. 19. Did you get any money from them in any way at all?

A. No, sir.

Int. 33. Was there any cash advanced to you on either mortgage or the faith of either, or on the faith that you would execute them?

A. Not a copper cent.

The very transparent claim set up by the defendants, that the Melter mortgages were taken at the long time of two years because of the desire of the bank to find investments of that character for their funds, has perhaps been already sufficiently dwelt upon. The very terms of the mortgages show that they are not nor is either of them made by way of investment, for a loan which the debtor may discharge at any time by paying the principal and interest up to that time, is not an investment. It can be taken only for the sake of better security. The creditor here gives to the debtor the choice of paying, at his own pleasure, without consulting the interests of the creditor, at any time within two years, perhaps at some season of the year when no investment can be found, when "money is a drug." Nothing is asked in return for this concession, except greater security for the debt.

A most important feature of the Krieger mortgage in the

present inquiry is, that by Krieger's own admission, the transaction was altogether irregular and unusual. He never, in his history as a banker, made but one other like it. Such transactions, out of the usual course of business, are *prima facie* fraudulent.

Krieger maintains that at the time he refused to renew Melter's $6,000 note with the old sureties, Isert and Urschel, he knew nothing unfavorable to the credit of either surety; that one was in "good report," the other an owner of several thousand dollars in real estate. Very well, then, the renewal was rejected solely in consequence of his apprehensions in regard to Melter.

In looking over the cases quoted, we find that in almost every one of them an effort was made, on the part of the defendant, to show the high financial standing of the bankrupt shortly before the transfers in question. In Wager vs. Hall it appeared that the bankrupt had claimed to be worth twenty or thirty thousand dollars over and above his debts, but a few days before he gave those mortgages which the court found no hesitation in annulling. But in our case, such evidence amounts to nothing. Melter failed mainly because his houses and lots had gone down in value. He, of course, the wish being father to the thought, tried to persuade himself that the losses were not so great as they turned out to be, and so he may have asserted his solvency at a time when the progressive depreciation of his property had long carried him below zero; but as he made attempts to sell, and did not succeed in getting his figures, his true condition was no secret to him.

Great stress is also laid on the few very small advances which the bank made him after the mortgages had been executed. These are easily accounted for. It was necessary for the bank to protect itself in the enjoyment of its mortgage security, by staving off any proceedings against Melter at least for the period of two months after the preference complained of. The bank may have been willing, even if not otherwise secured, to advance him a few hundred dollars to meet his most pressing demands, in order to stave off the evil day, especially as they

had in his stock a margin of five hundred dollars beyond the loan that was made to him early in June on the pledge of that stock.

It seems to us that all the elements for setting aside the two mortgages have been fully made out; the insolvency, both commercial and literal; the intent to perfer; the reasonable cause for belief which the creditor had of his debtor's insolvency in each of these senses; and moreover the knowledge of such insolvency; and finally that the mortgages were given and taken in such a manner and under such circumstances as to amount to a fraud upon the bankrupt law, as the creditor could not fail to know.

The judgment of the district court should therefore be reinstated, and that of the circuit court should be reversed.

P. A. GAERTNER,
D. W. ARMSTRONG,
L. N. DEMBITZ,
For Appellant.

108-74

OFFICE SUPREME COURT U. S.
FILED
JAN 2 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1882.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

HARRY STUCKY, ASSIGNEE, . . Appellant,

AGAINST

THE MASONIC SAVINGS BANK, Etc., Appellees.

Appellant's Brief.

P. A. GAERTNER,
D. W. ARMSTRONG,
L. N. DEMBITZ,
Counsel for Appellant.

COURIER-JOURNAL JOB-ROOMS PRINT.

Supreme Court of the United States

HARRY STUCKY, ASSIGNEE OF BEN. MELTER,

AGAINST

THE MASONIC SAVINGS BANK AND JACOB KRIEGER, SR.

} REPLY BY APPELLANT.

May it please the court, to consider a few words of reply from the appellant to the printed argument of the appellees, which is avowedly an attempt to answer some of the positions of our own brief.

And first, as to whether the appellant has shown that the conveyances complained of were made within two months of the commencement of the proceedings in bankruptcy.

In the original bill the date at which the involuntary petition against Melter was filed is left blank. The object of the bill was such as to render this date immaterial. This omission was overlooked in the amended bill, but the averment was distinctly made that each of the mortgages was executed and delivered within two months of the commencement of the proceedings in bankruptcy. The amended bill was therefore good in law, but subject as to this point to denial and the necessity for proof.

In all cases in which an issue has been made on the length of time between a preference and the beginning of bankruptcy proceedings, the contest has been on the time of the former, not upon that of the latter, which is fixed by the mere inspection of the record. In this case the date of the mortgages and of their acceptance is admitted, and the point is sprung for the first time in the Supreme Court as to the date when the proceedings were begun. It could not be sprung either in the District Court nor in the Circuit Court, because the record was at hand to set it right. If the petition in bankruptcy had been

filed on or after the 30th of July, 1877, the defendants below would never have troubled themselves about any other defense. As there is some doubt whether the mortgages took effect on the 28th or on the 30th of May, it may be fairly assumed that the proceedings were begun in time for the earlier of these dates, that is, on or before July 27; for a later day would have given rise to discussion as to the day when the mortgages became operative, but the record shows no trace of such a discussion.

Your Honors, therefore, approach the question with the full knowledge that the merits are on our side, and have only to satisfy yourselves that we have not lost a just cause by a mere slip of the pen. You only want to know as judges what you already know as men.

I.

A rule of the District Court is part of the law of the case, not part of a particular record. It was so held by this court in Mills vs. Bank of the U. S. 11 Wheaton, 439, the reference being in these words: "It is in this view that the rule of the Circuit Court of Ohio, *which has been referred to at the bar*, deserves consideration." The rule in that case was very similar to our own. It dispensed with the proof of the written instrument sued upon, when it was not denied under oath, just as the rule quoted by us dispenses with the proof of material averments that are not denied in the answer. In the opinion in 11 Wheaton, the rule of the lower court is highly commended.

In Duncan vs. United States, 7 Peters, 437, the existence of a rule of court was gathered like a precedent from its decisions, though it did not seem to have ever been formally adopted. The principle is laid down in Chitty's Pleading, I, 252, that a court of errors must take notice of the rules of the lower court when passing upon its judgments. (See also March vs. Commonwealth, 12 B. Mon. 25; Chitty vs. Dendy, 3 Ad. & El. 319.)

The rule given in our printed brief, and of which we have a certified copy for your Honors' inspection, was adopted to guard those lawyers, who practice mainly in the State courts under a modern Code, from being misled; it is framed on the basis of a similar provision in the Kentucky Code of Practice in Civil Cases of 1854, sections 153, 154, and of the New York Code of Procedure of 1871, section 149.

"No. 64. All material allegations of a bill . . . shall be considered as admitted unless denied by the answer."

The New York rule reads thus:

"Sec. 149. The answer of the defendant must contain: 1. A general or specific "denial of each material allegation of the complaint, controverted by the "defendant, or of any knowledge or information thereof, sufficient to form a "belief. Section 168. Every material allegation of the complaint, not con- "troverted by the answer as prescribed in section 149 . . . shall, for the "purposes of the action, be taken as true."

The Kentucky provisions are substantially the same.
The denial in each of the answers runs thus:

"Defendant denies that said Ben. Melter, being then or there insolvent, or in contemplation of insolvency, did within two months before the filing of said petition against him, in conjunction with his wife or otherwise, execute, acknowledge, or deliver to it a certain deed of mortgage, whereby said bankrupt conveyed to it the land described in said amended bill and exhibit B, with the view to give a preference to it."

This sort of denial is known in the books as a "negative pregnant."

Wait's Annotated New York Code, p. 145, note *o* to section 149, collects the New York authorities as to denials that are bad on this score. They are Hopkins vs. Everett, 3 Code R. 150, S. C. 6 How. Pr. R. 159; Young vs. Catlett, 6 Duer, 437, (443); Beach vs. Barvas, 13 Barb. 305; Livingston vs. Hammer, 7 Bosw. 670. "It is not clear that any thing in the Code warrants the grouping of several material allegations, and denying them as an aggregate in terms which are not inconsistent with the truth of any one of them." (Young vs. Catlett.)

A denial "that defendant cut *and* carried away wood *and* timber" was held insufficient in the next case. The sample of a negative pregnant give in Gould's Pleading, chapter VI, part I, section 33, is from the old system, where in trespass for cutting the plaintiff's trees, the defendant pleaded that "he cut them by command of the plaintiff," a replication that "the defendant did not cut them by command of the plaintiff" was held to be a negative pregnant, as "the denial extended as well to the act of cutting the trees as to the command. The traverse should have been *limited to the alleged command.*" In the Kentucky case of Morgan vs. Booth, 13 Bush, 480 (483), the Court of Appeals, in an action for slander, construed a denial by the defendant "that he used the language or any similar language falsely or maliciously, or with intent, etc.," as a confession of the speaking. Such a form of traverse is always intended to mislead.

If we take up the denial made in our record, quoted above, we find it consistent with the truth of any one of the following positions:

(*a.*) That Ben. Melter made the mortgage, and that he made it within the two months, and with the view to prefer; but that he was not, at the time, either insolvent or contemplating insolvency.

(*b.*) That he made the mortgage; made it within two months, and while insolvent; but not with the intent to prefer.

(*c.*) That he was insolvent; made the mortgage, made it with the view to prefer, but not within two months.

(*d.*) That he did not make the mortgage at all.

The last construction is fatal to appellees' whole case. If, at their option, the denial may be construed in the sense (*c*), we may as well claim to have it construed in the sense (*d*).

These insufficient denials in reality leave but the single inquiry in the case, as to whether appellees had reasonable cause to believe that Melter was insolvent and knew that a fraud on the bankruptcy act was intended. If the court is satisfied under the evidence that the case for the assignee is made out on these points, the decree must be for the appellant,

and it is wholly immaterial to consider, under these denials, either Melter's *actual insolvency* or his *intent to prefer*.

II.

But admitting that the answers are in apt form to put in issue the date at which the proceedings in bankruptcy were begun, we have proof enough in the record to establish it.

The mortgages, though acknowledged by Melter on the 28th, became operative only the 30th of May, for only then were they accepted, and only then the contemplated novation of the debt was brought about. This appears from the "account current," on page 89 of the printed record, thus:

"Cr. May 30, Discount, $12,000."

It also appears from the statement of values handed in by H. Nettleroth and J. W. Henning (pr. record, page 54), that a valuation was made by Krieger's order "as of the 30th day of May, 1877." This is an admission by Krieger that the 30th, not the 28th day of May, 1877, was the material day for testing Melter's solvency.

It thus is only necessary to bring the beginning of bankruptcy proceedings down as late as the 29th of July, 1877.

To fix the exact time we have the deposition of H. Nettleroth. He says (pr. record, page 56, side-page 144):

"Question. Do you remember the time that valuation was made?

"Answer. It was made about the end of July or the 1st of August, I don't remember which, of last year."

Also the deposition of J. W. Henning (pr. record, page 53, side-page 138):

"A. In the latter part of July or the first of August, 1877, I, in conjunction with Nettleroth, examined the estate of Ben. Melter."

(The paper is dated August 2d.)

Also (pr. record, page 54, side-page 13), he states that

he made the estimate at Krieger's request, in fact, under employment by him.

Jacob Krieger himself, in his second deposition, in answer to his own counsel (side-page 150) states as his reason for ordering the valuation by Henning and Nettleroth, that he wished to base upon it a composition in bankruptcy for Melter, which the latter, he says, thought possible. It is more probable, from his instruction to Henning and Nettleroth, to give the value as of May 30th, that he wanted to know how his mortgages would stand when attacked in bankruptcy, and that he *felt ill at ease about them then.* At all events it is clear that the bankruptcy proceedings must have begun before he gave the order to the two surveyors to make the estimate. The appellees admit this in their printed brief (page 9), saying, "That estimate was made at the request of Krieger, because *he had been applied to* by Melter for money to carry out a *proposed* composition in bankruptcy." Now if these men did their work no later than August 2d, and if before doing it—which must have taken some time—Krieger must have hunted them up, and before hunting them up must have consulted with Melter, and found out from him about the composition, and the latter must have gotten notice of the involuntary proceedings, the interval from the 29th of July until the 2d of August would hardly be long enough, and it is much more probable (as indeed it is the fact) that the petition in involuntary bankruptcy was filed on the 27th. But the very anxiety which Krieger felt about the events of the 30th of May shows that the petition was in time to overhaul them.

Such proof has always been held sufficient "to go the jury" on an issue like the present, on which the court felt morally certain of the truth of the affirmative.

III.

There is one additional consideration which appears to us entirely conclusive of this matter.

The *original bill* contains the allegation that the creditor's

petition against Melter "was filed on the —— day of ——— A.D. 1877." The *amended bill* avers that the mortgages executed within two months of the filing of the creditor's petition were fraudulent preferences, etc. In none of the answers is there any suggestion of a traverse of the allegation of the original bill *as to the date of the filing of the creditor's petition.* The traverse, which we have quoted from the answers, is palpably and exclusively addressed to the averments of the amended bill in which the mortgages are impeached as fraudulent preferences, and not in the remotest degree to the date at which the original bill alleged the petition to have been filed. If it be objected that it was impossible to traverse the allegation of the original bill because the date was left blank, we have only to reply that it is for that reason all the plainer that the answers contain no such traverse. The simple question, therefore, is whether, under the rule of the court, which we have quoted, *and in the absence of any denial or attempted denial whatever,* we have enough in the record to supply the date and fill the blank in the original bill. The date of the mortgages being abundantly shown as not earlier than the 28th of May, we have only to establish our right to fill the blank with any date within two months of that time to sustain our case. This demonstration, we think, has already been made.

As to *other matters* in appellees' argument, we shall be very brief. We wish to express our astonishment that with our printed argument (page 16) before them, counsel should have quoted the witness Meddis as estimating Melter's houses and lots at $96,000, when those actually owned by him came only to $74,000 even in the opinion of that witness; and that they should quote Melter as estimating the property at ninety-nine thousand dollars when he only says that it had *cost* him $98,400 at a period from which the general decline had been fifty per cent. (pr. rec. p. 37, side-page 96); and that they make him set down his personalty at $17,000, while we can only find his estimate of his grocery-stock, including whisky, at five or six thou-

sand, and a refusal to name as high a sum as $3,000 for the value of his ice (pr. rec. pp. 36, 37). Allowing for these corrections, the figures of the appellees are right; somewhat as the definition of a crab that was submitted to Buffon, "A red fish that walks backward," was true enough after expunging the three errors that he pointed out.

Nor do we understand the meaning of appellees' counsel when on page 20 they say, "During the time this note lay over (*i. e.* from April 23 to May 30), his (Melter's) drafts amounted to twice as much as his deposits." The drafts are, $14.60—this is real; $6,000, the check given to the bookkeeper for the proceeds of the renewal which the president rejected; $3,263.90, which nearly corresponds in amount to a discount of good paper (mainly renewal) made on the same day; $396.95, the exact amount of a like discount for renewal, the checks being made each time to lift the old notes; $30, (a real drawing of money out of bank); and then nothing till May 30. The real drafts are $3,705.45; the deposits and discounts during the same time amount to $3,837.80 (pr. rec. p. 89); and about nine tenths of all this crediting and checking only subserved the formal purpose of renewals (pr. rec. p. 69).

As to the *commercial insolvency* of Melter at the time of the making of the mortgages, and as to the bank's opportunities for seeing it, we have no reply to make, for the brief of the appellees is altogether silent on this branch of the subject, and in view of the repeated decisions of this court this silence of the counsel for appellees is practically a surrender of the whole case.

Among the authorities quoted by appellant are the two St. Louis cases, Tiffany vs. Lucas and Tiffany vs. The Boatmen's Savings Institution, both growing out of the bankruptcy of one Darby. There could not be weaker cases for an assignee than these. In each of them the principal defendant was not a creditor of the bankrupt, nor even the friend or associate of a creditor, acting in his interest, but a perfect stranger, who in the first case bought a part of the bankrupt's property in open

market, and in the other case, in like manner advanced money to him, on mortgage, in the ordinary course of its business. Only the large amount involved could have led this court to give to them an extended discussion. If our contention were that the mere insolvency of a debtor deprived him of all right of disposition over his estate, the citations would be pertinent, for these two cases decide the point just stated, and nothing more; but the present case being wholly destitute of any analogous element, we fail to appreciate the legal acumen displayed in making the citations.

There are also two references to Clark vs. Iselin, and the words are quoted that "there must be guilty collusion to constitute the fraudulent preference condemned by the statute." This was the case of a judgment-lien obtained by a creditor, and the question was whether the debtor had "procured or suffered his property to be taken on legal process." The first case in this court in which this question was presented was Wilson vs. City Bank of St. Paul. In that case the court said:

"It is also argued that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property, necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow.

"The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, that he must be held to intend those consequences. But it can not be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

"Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidence of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such preference as the law forbids."

The line of distinction thus marked out between all other modes of preference, none of which can be consummated ex-

cept by the "*positive* and *affirmative*" act of the debtor and a preference obtained by the mere failure of the debtor to resist a suit to which he has no defense has been consistently adhered to by this court. The principle declared harmonizes the statute and makes its intention strictly homogeneous, which, on any other basis of construction, it would not be. The court, in effect, simply say that the intention of the debtor in respect to the preference is to be inferred from his *acts*. If he does not act, but is simply passive, where neither law nor morals require that he should act, then there is nothing from which the fraudulent intent can be inferred. The execution of a mortgage, however, is a "*positive act*," and establishes the "guilty collusion" as perfectly as could the fullest co-operation in "procuring or suffering property to be taken on legal process." The character and result of the debtor's acts in the two instances are precisely the same.

The appellees also quote from Jones vs. Howland, and strange to say the very language quoted covers that aspect of the case which was commented on at length, dissented from by this court, and declared inapplicable to the bankruptcy act of 1867 in Wager vs. Hall, 16 Wall. 599. The act of 1841 avoided preferences only where the debtor was not merely insolvent and had the intent to prefer, but was also "in contemplation of bankruptcy." Under the act of 1867 the preference is void if made with the "intent to prefer" when the debtor is merely "insolvent or in contemplation of insolvency." The quotations from Jones vs. Howland would be apt and sound in the discussion of a case under the act of 1841; they can have no application to a case under the act of 1867.

The appellees insist very strongly on the repeated promises made by Melter to give mortgages for his overdrafts. We have shown in our former brief the hollowness of the assertion; but were it so, we know of no law, and they have referred to none, which would upon that ground alone improve or strengthen their securities. A promise to give a mortgage does no more work out a lien on the promisor's lands than his promise to pay

the debt; as long as the conveyance is not made in accordance with the promise, the property is subject to the claims of all creditors. When the conveyance is made, the preference denounced by the statute is given. But perhaps the most significant circumstance in connection with this question is that *the answers* contain no intimation that a dollar had ever been loaned to Melter on his promise to secure it by mortgage. To any discerning and intelligent man is not this fact in itself sufficient to dispose of the pretense that any money was loaned on the faith of such promise? How can the existence of such a fundamental fact be reconciled with the total silence of the defendant's pleadings in regard to it? Although Grant vs. National Bank was published just before the evidence in this case was taken, it had not been published when these answers were filed.

On page 6 of their brief counsel for appellees display at length all transactions of the bank subsequent to the execution of the mortgages to which Melter was in any manner a party. Examination of Melter's account with the bank and of the testimony of Krieger discloses, *first*, that all these transactions of any magnitude were renewals; and *secondly*, that they were nearly all, including the renewals, for the account of others who, as shown by Krieger's testimony, were amply good for the amounts without regard to Melter; and that, allowing for the margin in the value of Melter's bank-stock over the sum for which it was pledged, the transactions on *Melter's credit* after the execution of the mortgages amounted only to a very few hundred dollars. (Page 37 of our original brief.) The tribute which counsel pay to the intelligence (perhaps shrewdness would have been the more accurate word) of their clients (page 13 of their brief) may illuminate this point.

Counsel say that when the six-thousand-dollar note was credited to Melter's account in January his overdraft was less than eighteen hundred dollars. (Page 20.) To have been exact they should have said that his overdraft was then nearly eight thousand dollars, and that it remained nearly eighteen hundred after crediting this note.

Counsel say, "There is not a word in the pleading nor a line in the evidence to indicate that Krieger indorsed the note and took the mortgage in trust for the bank." We had scarcely thought it possible for lawyers to differ as to *the effect* of the language used by Krieger on this point; and it would certainly be difficult for language to be more explicit in its own terms. (Pr. rec. page 67.)

Q. Why, then, was the mortgage from Melter to secure that debt made to you?

A. The property that I took the mortgage on had a previous mortgage on, and the bank could not take a mortgage on it. I felt satisfied, etc.

Q. Was the difficulty in regard to the bank taking the mortgage on account of some provision in its charter?

A. Yes, sir; as I said, there was a mortgage on the property that I took the mortgage on.

Krieger's action was manifestly simply that of *president of the bank*, and he, in that capacity, employed the device which he considered necessary to secure its debt. That he holds the security thus obtained as its mere trustee, and for its benefit, is too plain for argument. (Our former brief, page 25.)

Counsel on page 18 employ very strong, almost violent language, in disclaiming Krieger's guardianship over Melter. They say that such guardianship, and the fact that Krieger "counselled" Melter to make an assignment "exist only in our imagination." Now *Krieger* certainly did become Melter's assignee. He says (page 67, pr. rec.) that "Melter *advised* with him in regard to making the assignment."

Q. Did you approve of his counsel in making the assignment?

A. I did.

The question is obviously misprinted; but whatever its exact terms may have been, no intelligent person can doubt that in substance it asked if Krieger approved and "counselled" the making of the assignment, and he says that he did. Krieger's intimate relations with Melter and knowledge of his business have been dwelt on in our brief at sufficient length.

We correct counsel by saying that we have at no time contended that there was any "conflict" between Grant vs. Bank and the earlier cases, and that the earlier cases should be followed. Our brief will be searched in vain for any suggestion in the remotest degree resembling this.

Counsel plainly concede, as indeed could not with any plausibility be controverted, that the appellees' knowledge of Melter's condition was such as to put them on inquiry—to make inquiry a duty. Conceding this much, of course their only recourse is to claim that the inquiry was in fact pursued to the limit of all that they could reasonably be expected to learn—that their inquiry was "diligent and painstaking." (Page 17.) Up to this point the position of counsel is strictly in harmony with the line of argument followed at length in our brief. But counsel say that "Melter's books were not correctly kept"—there is nothing in the record to sustain this assumption but we grant it—"that it would all have turned out right if Melter's books and statements of liabilities had been true," and that "that was a matter they could not know."

Now if appellant's right of recovery in this case required that appellees should be held responsible for facts which they could not have learned, or *even for facts which they did not learn*, in the investigation which it is admitted they made, then the case would be a hard one.

But that is not at all the case we urge. We may frankly concede that, considering "the painstaking and diligent inquiry" which Krieger made, no part of Melter's debt which he did not ascertain either from the books or otherwise should be taken into account against him. As to whether Melter's books were correctly or incorrectly kept is therefore wholly immaterial. Leaving entirely out of view all debts not shown by the books or otherwise known to Krieger, he still knew all that is required for the purposes of this case. He knew of $67,000 of debts before taking the mortgages, and that, as we have shown, was considerably in excess of the fair and true value of Melter's estate. It is this $67,000 of which he did

know that we seek to make the basis of his responsibilty. For him to answer to this, "Yes, it is true I knew of $67,000 of debt; but there were there $30,000 more, which the books did not show, and of which I knew nothing," is, under the circumstances of this case, much the same as if a creditor, of whom the surrender of a preference was demanded, should reply that he ought to be allowed to hold on to it because he had supposed from what he knew when obtaining the preference, that the debtor's estate would pay fifty cents on the dollar, whereas it turns out that it will pay less than twenty cents.

If what counsel say in relation to Grant vs. Bank were offered in a brief in that case, it would very justly fall within the remark of the court on the brief of the assignee's counsel in that case. It would certainly be "an able and ingenious" argument in support of a different conclusion from that arrived at by the court. But we do not observe that in the attempt to distinguish that case from this they touch upon a single *essential* point. We tendered them, as sharply defined as it was possible for us to state them, the *controlling differences* between the cases, and they have not offered a word of reply on a single one of these points.

We recapitulate briefly:

1. The element of commercial insolvency did not enter into the Miller case, while it is a most important factor in the Melter case.

2. The bank, in the Miller case, only knew of debts equal to about one half of the value of Miller's estate, and the court held that they could not reasonably be required to have had notice of any larger amount.

3. Miller's estate was wholly clear of mortgages or other encumbrances.

4. Krieger knew that Melter owed $67,000; he knew every dollar's worth of property he owned, and this property at a fair valuation was worth less than the debt of which Krieger knew.

5. Melter's estate was so covered with mortgages that Krieger could only find room for his mortgages by taking one of

them in his own name, although intended wholly for the security and benefit of the bank.

If we are right in supposing these to be the critical distinctions between the cases, the failure of appellees' counsel to notice them is a virtual admission that Grant vs. Bank, properly construed, is not a precedent in their favor.

A word more on the proper construction of the amendment of 1874.

Since our brief was printed, 104 U. S. has been given to the public. The case of Sage vs. Wyncoop, page 318, has an important bearing. Your Honors, in passing upon the requirement, under the amendment of 1874, that the creditor should "*know* that a fraud on the bankruptcy act was intended," dispose of it by saying, "The agent of the appellant *knew* it in a *legal sense*." Hence no actual proof of actual knowledge seems to be required; the words of the amendment have no magic force in them.

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108-74

SUPREME COURT, U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1882.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

HARRY STUCKY, Assignee, Appellant,

vs.

THE MASONIC SAVINGS BANK, Etc., Appellees.

Appellant's Supplemental Brief.

P. A. GAERTNER,
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Counsel for Appellant.

E. W. Oyster, Printer, Globe Office, Washington, D. C.

Supreme Court of the United States.

HARRY STUCKY, Assignee of BEN. MELTER,
vs.
MASONIC SAVINGS BANK and JACOB KRIEGER, Sr.

Supplemental Brief by Appellant.

I ask leave to return for a moment to the question as to whether the condition of the record in respect to the two months point is such that the appellant can safely stand upon it. I am prompted to do this because in the minds of some a degree of importance seems to be attached to the matter which I had not at all anticipated. I had supposed it would require brief explanation and nothing more.

As to the sufficiency of the amended bill on its face, there is no room for question. It was altogether sufficient to say that the mortgages were executed "within *two months*," &c., and it was not at all necessary to say that the mortgages were executed on one named date and that the proceedings in bankruptcy were begun on another named date. If, therefore, there is no denial, or no sufficient denial, of this averment, the case for appellant, under the rule of the District Court, which, and the powers to adopt which, I do not again pause to discuss, stands made out or admitted. That the denial in the answer to the amended bill which it is now sought to apply to this matter is insufficient, is apparent at

the merest glance. A clearer instance of "negative pregnant" could not easily be found or conceived of.

But this denial was never intended to make any issue as to whether the date at which the mortgages were executed was within two months of the date at which the proceedings in bankruptcy were begun. And from the beginning of the case until the appearance of appellees' brief for this Court, there has not been the slightest suggestion on either side so construing it or seeking to so construe it. If there had been any foundation in fact for such a defense, that is the one that would have been most promptly made and strenuously insisted upon from the very beginning of the case. The agreements on pages 17 and 24 of the printed record show that there was before the District Court the fullest evidence on this point, and that that evidence is not in this court solely because of the agreements we have courteously made at the request and instance of and for the convenience and benefit of the appellees. That these agreements were so made in the interest of the appellees is apparent from their very face and terms. For the appellees, after having gotten the record into this condition, to seek to put a *new construction* upon their pleading and to introduce into the case a *new issue* opposed to the fact, is certainly to fall very far below that ideal which supposes courts to be organized for the investigation of truth and the administration of justice. The absence of all trace of any such contention from the record in the lower courts is itself conclusive as to the fact, and taken in connection with the suggestions on page 6 of our brief in reply to the original brief of appellees, should be sufficient to satisfy the judicial mind and conscience in a matter where each member of the court as a man must be already thoroughly satisfied of the truth of the proposition. All that counsel for the appellees says in his supplemental brief, as to the estimate of Henning and Nettleroth, proceeds upon the concession that that estimate was made after the petition in bankruptcy against Melter was filed. As that statement was dated August 2, and Nettleroth says in his deposition

that it was made the "last of July or 1st of August," it amounts to a reasonable demonstration that the proceedings were begun before July 30. Counsel for appellees have at no time suggested and will not now suggest that the point has the smallest foundation in truth.

When your Honors, bearing in mind the oral argument of counsel for appellees, come to read the record and ascertain for yourselves how different the real case is from that presented and discussed by that gentleman, you must, I am sure, experience no slight surprise. In a word, I mean to say in sober truth, and not as employing any mere figure of speech, that while counsel has exhibited great ingenuity in constructing a case for his clients, he has by no means achieved a commensurate success in arguing the case contained in this record.

As heretofore stated by me, unless this case is to be taken out of the principles explicitly announced by this Court in every case in which the question has arisen—unless the doctrine of commercial insolvency under the bankrupt law is to be completely overthrown—the fact and circumstances of Melter's commercial insolvency, as known to the appellees, are of themselves sufficient to carry the case for appellant. This insolvency existed both in respect to the overdraft and the note.

This overdraft account stood unchanged from April 24, although Krieger was more than urgent to have it settled. (See original brief, page 23.) And the case in regard to the note was far worse than the mere ordinary inability of a debtor to pay his debts in money as they mature. Krieger told Melter that he must either pay the debt or renew it with an additional satisfactory name. Melter's inability to furnish another indorser during the period of thirty days was the fullest possible notice to Krieger, not simply of a want of ready money, but of an utter and most significant loss of credit. He could no longer be in doubt as to the extent of the disaster. The understanding with regard to the renewal, and the efforts made to effect it before resorting to

the mortgage, are fully shown in the following extracts from the evidence. Melter says, (printed record, pages 29 and 31:)

Interrogatory 16. Did you try to renew that paper with Krieger?

A. He told me that I should try to get different names on it, but I did not know where to go to. * * * He said, get other names on it, and I will take the paper.

Answer 34. Well, he insisted on me to renew the note; that is, he wanted to get other names on it.

Krieger says, (pages 65 and 72, printed record:)

Q. Why was not the note, which matured April 19-21, for $6,000, paid at maturity?

A. We had agreed to renew it.

Q. When was the agreement as to renewal made?

A. It was made several days before the maturity of it.

Q. How long after the maturity before the new paper was offered?

A. I think a day or two after. * * *

Q. I understand you to say that you were not satisfied to receive the paper in renewal with the old names on it of Isert and Urschel without additional security?

A. We were satisfied to loan Mr. Melter the money, thinking him perfectly good, but still wanted other names in addition to it, especially as he had said he would bring other names before.

A. (Page 72.) As I said before, that $6,000 note—Melter stepped into the bank when I was not in the office, neither was the cashier, and applied to our bookkeeper, and the bookkeeper foolishly, and without any authority, surrendered the $6,000 note, and made Melter issue his check. Then the renewal, which he brought in, was not in accordance with the agreement, which was, that he was to bring another name.

And it was this note dishonored for thirty odd days, with this futile attempt at renewal, which one of the mortgages was given to secure, and the other was for the overdraft, unreduced through the thirty odd days of persistent urging.

Counsel for appellees goes to the deposition of W. W. Gardner to prove that Melter's ice was worth $10,000 although there is not a competent line in the deposition, and any attorney who would have cross-examined Gardner on such evidence should have been disbarred—and when Egelhoff,

cashier of the bank, and who paid the hands that put it up, says the ice "could not have been worth more than $2,000 at the highest."

Counsel, from the same source, gets a valuation of Melter's stock of groceries at $15,000, when Melter testifies that his stock was only worth $4,000 or $5,000, and when Krieger himself, as assignee for creditors under Melter's deed, sold the stock for $3,500.

Counsel, with earnest good faith, laments that he must try this case before a court to whom Mr. Krieger is unknown. This is a most curious illustration of the widely divergent views which different men may take of the same subject. Now I, too, lament that Mr. Krieger is not known to the court, but for a reason directly the opposite of that which moves the counsel of the appellees. Mr. Krieger is a man of eminent smoothness and plausibility, and I wish it were possible to file him as an exhibit in the record, and show the court just how "*smart*" a man he is.

In his enthusiasm for his clients and their cause, counsel for appellees mentions as something "greatly to their credit" the fact that they actually recorded their mortgages the very day they were executed. Now, it so happens that mortgages in Kentucky take effect exactly in the order in which they are lodged for record, and these mortgages, concealed or hidden away, were worth a good deal less than the paper on which they were written. Where concealment was so dangerous to their own interest, the fact that it was not resorted to appears to me the slenderest of all possible grounds of eulogy.

The extensive use which counsel for appellees makes of Meddis' so-called estimate of Melter's estate is, while not highly respectful to the Court, very appropriate to the system of shams and false pretenses on which the whole defense rests. This estimate, made hurriedly, in an eating-saloon, includes one piece of property at $15,000 which Melter did not own, and on another which not a cent had been paid, but which had been bought at $5,500, is included at $7,000. (Page 91.)

Deducting these amounts, and allowing for a depreciation of only twenty-five per cent., we have an estate of only a little over fifty thousand dollars. Before any tribunal knowing the two men, the estimate of Meddis would not be worth a second glance where that of J. W. Henning was to be had. And here I again lament that the Court does not know the man. In Louisville, J. W. Henning is *the* authority on all matters pertaining to real estate, and, on that subject, speaks *ex cathedra*. And, yet, his is the estimate the appellees seek to repudiate, although made for them. By Krieger's instructions, this estimate was made as of the 30th day of May, the very day of the mortgages.

The radical error of counsel, in dealing with Melter's real estate, is in computing on the basis of its cost. I said very early in my opening statement that Melter's real estate represented a cost price of nearly $100,000, including some unpaid purchase money and mortgages for money to build with. But the cost of an insolvent debtor's property, in some remote past, is entirely immaterial. It is simply a question of present value, not of cost. The value of Melter's property, May 30, 1877, is shown beyond question by the Henning and Nettleroth estimate, by the evidence of the assignee, and even by that of Krieger himself, who, as we have seen, when put to the details, substantially confirms the other estimates. (Original brief, page 18.) To start, therefore, with the cost of the property, as fixing its value in 1877, was a grave blunder for counsel, unless he had first made the heavy discount for depreciation, which the witnesses declare to have taken place.

And in the computation of Melter's debt, of which Krieger had knowledge prior to the execution of the mortgages, counsel is guilty of another error, which seems to me to be fatal to the value and soundness of all that portion of his argument. This error consists in totally ignoring the "inquiry or investigation into Melter's affairs," which Krieger made before taking the mortgages. Krieger himself turns to this time and again in his deposition, and in their original brief, counsel for appellees placed the greatest emphasis upon

it as being so "thorough and painstaking" as to excuse Krieger from all responsibility for matters which that investigation did not disclose to him; and in my opening I frankly stated that in view of that inquiry I did not think this case should justly be treated as one of reasonable cause to believe, but as one of actual knowledge. In other words, while there was a large amount of debt which did not become known to Krieger through his investigation, yet he probably had reasonable cause to believe that he had discovered the whole or practically the whole of it, and should be held responsible accordingly, and not otherwise. I conceived the whole case to be in a nutshell, and staked it on this proposition:

Krieger knew the whole of Melter's estate. (Printed record, side page 189.) He knew of debts, as the result of his inquiry, in excess of the value of this estate, as men of ordinary prudence and capacity would have estimated it. He therefore *knew* that Melter was insolvent.

Counsel concedes that Krieger knew of liens on Melter's property to the amount of $18,275, and then that the Masonic Savings Bank held paper on which Melter was principal debtor to the amount of $25,093, excluding the Immorde debt of $8,800. These two amounts aggregate a debt of $43,368; this is without adding a dollar of outside unsecured debt. But with a debt outstanding, in addition to the sum just mentioned, of nearly fifty thousand dollars, such a supposition is wholly untenable. Remember that Krieger says his investigation was "painstaking and thorough." It is said that Melter spoke of $7,000 as his unsecured debt; but of course that meant, if he did name that amount, his debt other than that held by the bank, for it would have been very absurd to talk of a debt of that amount to a creditor who held on one basis $25,000 and on another $34,000. We have here, then, on the basis of the least amount of which Krieger could possibly have known, a debt of over fifty thousand dollars, and this exceeds the value of Melter's estate in the hands of his assignee. Bear in mind that on the basis of a secured debt of $44,000 we in no event attempt

to hold Krieger responsible for an unsecured debt of more than $23,525. (See agreement in record as to the schedules of the bankrupt.) It would not be just to hold Krieger responsible for any larger debt as of the date of the mortgages than the bankrupt knew of at the date of the schedules. But counsel for appellees throughout his calculations altogether loses sight of a large sum of this debt, and in reducing the secured debt from $44,000 to about $18,000 forgets to look out for any part of the difference except the $12,000 due the bank, and further forgets that as the secured debt is reduced the unsecured debt must be proportionately increased. But to suppose that an acute and experienced banker like Krieger, in making a "thorough and painstaking investigation" into Melter's affairs, could only learn of the $7,000 of debt of which Melter himself told him, is utterly unreasonable. And, indeed, Krieger himself has clearly proven for us the falsity of this hypothesis. Both Melter and Davis testify that at the conference on the 4th of July preceding the execution of the assignment to Krieger the latter knew of debts against Melter to the amount of between $60,000 and $67,000, and Krieger says that between the execution of the mortgages and the date of the assignment he learned no new facts about Melter's standing. To allow any margin at all for the result of Krieger's investigation throws the amount of debts in excess of the reasonable value of Melter's estate, and shows that Krieger knew he was insolvent.

D. W. ARMSTRONG,
Of Counsel.

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OFFICE SUPREME COURT U. S.
FILED
DEC 20 1882
JAMES H. McKENNEY, Clerk.

United States Supreme Court.

OCTOBER TERM, 1882.

HARRY STUCKY, Assignee, - - - - Appellant,

VERSUS

THE MASONIC SAVINGS BANK and JACOB KREIGER, Sr., - - - - Appellees

Brief for Appellees.

J. P. HELM and W. O. DODD, Counsel for Appellees.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

United States Supreme Court.

OCTOBER TERM, 1882.

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VERSUS

THE MASONIC SAVINGS BANK AND JACOB KREIGER, SR., . . . *Appellees.*

} ***Brief for Appellees.***

STATEMENT.

This appeal is prosecuted by appellant as the assignee of Ben Melter, a bankrupt, to reverse a decree of the Circuit Court of the United States for the Kentucky District, by which certain mortgages made by the bankrupt to appellees were held to be valid as against the assignee.

The original bill was filed in the district court against the appellees and others holding liens upon the property of the bankrupt, praying authority from the court to sell the property free of the liens. That was the sole purpose of the suit when brought. It was a proceeding under section 5075 of the Revised Statutes of the United States, and no attack was therein made on the claims or securities held by the appellees.

The appellees answered, setting forth their claims and the mortgages securing the same, alleging that none of the con-

ditions of the mortgages had been broken, and praying the court to protect their interest by appropriate orders and decrees.

The appellant, without filing any replication thereto, filed an amended bill, in which he alleged that the bankrupt being insolvent did, within two months before the filing of the petition against him, execute and deliver to appellee, Jacob Kreiger, Sr., a mortgage upon his property with a view to give a preference to him; that Kreiger was a creditor of the bankrupt, or had a claim against him, or was under a liability for him; that Kreiger had reasonable cause to believe the bankrupt was insolvent, and knew that the mortgage was made in fraud of the bankrupt act.

2. That Melter (the bankrupt), being insolvent or in contemplation of insolvency or bankruptcy, did, within three months before the filing of the petition against him, make said mortgage to Kreiger with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the provisions of the bankrupt act, or to defeat the operation and effect of said act; and that Kreiger then had reasonable cause to believe Melter to be insolvent, or to be acting in contemplation of insolvency, and that he knew said mortgage was made with such view.

3. That the mortgage was made to appellee, the Masonic Savings Bank, within two months before the filing of the petition against the bankrupt, with a view to give a preference to said bank, which was a creditor, and that the appellees had reasonable cause to believe him insolvent, and knew that the mortgage was made in fraud of the provisions of said act.

Each mortgage was to secure a note of six thousand dollars, and appellant claimed that both were void and sought to have them annulled.

The appellee, Kreiger, answered and denied the allegations of the amended bill, and alleged that the mortgage to

him was made to secure a liability created at the time of the execution thereof.

The appellee, the Masonic Savings Bank, answered and denied the allegations of the amended bill.

Replication was filed, proof taken, and the district court held that the mortgages were made in violation of the provisions of the bankrupt act, and set them aside. An appeal was taken by the present appellees to the circuit court, where the decree of the district court was reversed, and the mortgages held to be valid.

From that decree the appellant, who was complainant in the court below, prosecutes this appeal.

The Facts.

Melter was adjudged a bankrupt upon the petition of his creditors. The original bill (Record, page 2) states that a petition of creditors was filed on the — day of ——, A. D. 1877, and that on the — day of August, 1877, Melter was adjudged a bankrupt on that petition, and that on the — day of August, 1877, the entire estate of the bankrupt was conveyed by the register to the appellant as assignee. The month in which the petition was filed is not stated and does not appear in the record.

On the 28th day of May, 1877, a mortgage was executed by the bankrupt, in which his wife united, upon certain real estate in the city of Louisville, Kentucky, belonging to the bankrupt, to secure the payment of a note executed that day and payable to the order of the Masonic Savings Bank, two years after date, for six thousand dollars, and bearing interest from date at the rate of eight per cent per annum, payable semi-annually.

The mortgage to Kreiger was executed on the same day —May 28, 1877—upon certain other real estate in the city of Louisville, and was made to secure the payment of a note bearing even date, to the order of Jacob Kreiger, for six

thousand dollars, payable two years after date, with interest from date at the rate of eight per cent per annum, payable semi-annually.

Both mortgages were acknowledged by the bankrupt on the 28th day of May, 1877, and by his wife on the 30th day of May, and lodged for record on the last-named date. The bankrupt had been for many years a retail grocer in the southern part of the city, in which business he had accumulated a moderate fortune.

The appellee, Jacob Kreiger, was the president of the Masonic Savings Bank, at which bank Melter kept his principal account.

In April, 1877, a note of the bankrupt for six thousand dollars, indorsed by two persons, matured at the bank, which the bank was unwilling to renew with those indorsers for so long a time as the bankrupt desired. (Record, page 61.) The bankrupt wanted long time and more money, and the bank was willing to accommodate him, provided the security was satisfactory. The bankrupt had expended between twenty-five and thirty thousand dollars in building houses, which rendered his available means too short for carrying on his usual business. (Page 65.) Kreiger was in no way liable on the paper up to that time. (Page 62.) Kreiger then agreed to indorse the note and give two years' time, provided the bankrupt would secure him by a mortgage. The property was already mortgaged for a small sum, and the charter of the bank prohibited it from taking a second mortgage. (Page 25.) Kreiger therefore indorsed the note and became liable to the bank, and the mortgage was given him as indemnity, and the note indorsed by him and discounted by the bank. (Page 62.)

Some time previous to the execution of the mortgage to the bank, Melter asked permission to overcheck his account, which was given him on his agreement to secure the debt by a mortgage, or pay it by the sale of ice. It is true Melter denies this, after a fashion, but the president and cashier are

positive in their statements, and there can be no reasonable doubt about the truth of this testimony. This is the way Melter denies it:

Cr.-q. 13. Did n't you tell Mr. Eglehoff (cashier) several months prior to that time that you would give a mortgage?

A. Not that I know of, because Mr. Eglehoff is not like Mr. Kreiger—not that I know of.

Cr.-q. 14. Do you know that you did n't tell him?

A. I do n't know if I did; I say, not that I know of. All contracts that I had were with Kreiger, most of them.

Cr.-q. 15. You stated in your examination-in-chief that you did not want to give mortgages, because you hoped to get through without mortgages?

A. I did. (Printed Record, page 32.)

The president and cashier say that Melter was sick in bed for two months or more in the early part of the year 1877, and not able to attend to business, and asked permission to overcheck, which he agreed to make good as soon as he was able to attend to business.

Melter says he was confined to his bed by sickness during the months of January and February, 1877. (Record, p. 30.)

On the 28th of May, 1877, these over-drafts amounted to a little over $6,000, and the same was put into a note for $6,000, payable in two years, and the mortgage made to secure it in consummation of the agreement. (Page 63.) The execution of this mortgage was delayed at the instance of the bankrupt, on his representation that he had a large quantity of whisky and ice which he wished to sell, and in that event it would not be necessary to make a mortgage. (Page 64.)

After the execution of the mortgage, June 5th, the bank discounted a note for Melter for $1,500, secured by a pledge of twenty shares of stock of the bank owned by him, on which it had a charter lien for any and all debts due or owing by the bankrupt to it.

In doing this, the bank relinquished to the extent of the

loan a security that they could not possibly have been deprived of. On June 5th the bank also discounted Melter's note to Stege & Reiling for $508.70. On June 13th it took Melter as indorser for Immorde on a note for $1,000. On June 13th it discounted Melter's note to Marcus for $100. On June 14th the bank honored his check for $1,075, although he was then overdrawn $41.01. On June 19th the bank discounted Dr. Galt's note to Melter for $300, although Galt was known to be pecuniarily weak. And on the 6th of July it accepted him as indorser in the renewal of note of Immorde and Marcus for $8,500. (Record, pages 67–8.)

At the time the mortgages were made, Kreiger regarded Melter perfectly solvent, and the bankrupt told him he had three dollars' worth of property to one dollar of indebtedness. (Page 72.)

He regarded him safely worth from fifty to seventy-five thousand dollars over his debts. (Page 73.)

A month after the execution of the mortgages, July 4th, he made a careful examination of Melter's assets and liabilities, with Melter and Melter's lawyer, and after placing the liabilities above the estimate of the bankrupt and the assets much lower, the assets exceeded all liabilities that could be ascertained or were known to exist by at least $25,000. (Page 73.)

Even when bankruptcy was threatened, Melter insisted that he was abundantly solvent. (Page 73.) At the time of his bankruptcy, he says he thought his property was worth $99,000. (Page 35.) In his schedules in bankruptcy he makes his entire indebtedness a little less than $68,000, and his assets $93,300. (Page 25.)

At the interview—July 4th—more than a month after the execution of the mortgages, Melter represented to his lawyer that he could pay out and have a surplus. (Page 47.)

He thought it would only be necessary for him to sell *some* of his property. In answer to question 129 (page 40) he says: "I told you that I wanted to sell *some* of it to pay

my debts; I could not save it all." Melter had no idea of giving a preference. He was asked to state his feelings about giving the mortgages (Record, page 28), and said: "My feeling at the time was that I would get out without giving any mortgages, because I had a good deal of money invested in ice, and I offered some of my houses for sale—that is, the one Miller lives in, etc."

Melter began business in 1862, on a capital of $600. He was an industrious German. At the time of his bankruptcy he owned a double store on the corner of Third and Breckinridge streets; two dwelling-houses on Third, just north of Breckinridge street, and two upon Breckinridge, east of Third; also a double stone-front house on the southwest corner of Second and Breckinridge streets; a two-and-a-half story house on First and Gray, and some property on Dumesnil street, on which he had built extensive ice-houses.

This property was then, and is now, located in the best part of the city. Kreiger had known Melter since 1864, and had seen him rise by his own exertions from poverty to wealth. For a short time Melter retired from active business with a competency; but, being accustomed to an active and busy life, he could not long endure ease and indolence. (Page 75.)

On the first of January, 1877, Meddis, a real-estate agent, estimated Melter's real estate to be worth $96,000. (Page 91.)

Taking Melter's estimate of the value of his personal property at $17,000 (page 93), and we have an estate worth about $115,000. It is manifest from the whole testimony of Melter that he did not regard himself as insolvent. Even when he was threatened with bankruptcy he begged Kreiger to aid him and prevent it. (Page 73.)

Neither did Kreiger regard him insolvent. He speaks of his knowledge of Melter's condition as follows (Record, page 74):

Q. 15. Did you have any reason to believe that Melter was insolvent at the time the mortgage was taken by the bank?

A. None whatever.

Q. 16. Did you have any reason to believe him insolvent at the time the mortgage was given to you, and you indorsed the note?

A. None whatever.

Q. 17. Did you then believe him perfectly solvent?

A. I thought so.

Q. 18. Did you think that he had a large and considerable surplus?

A. I thought that he had considerable.

Q. 19. That was after investigation?

A. Yes, sir.

Q. 20. Melter was a regular customer of your bank?

A. He had been there for nearly ten years.

Q. 21. He had made deposits and obtained discounts from the bank?

A. Yes, sir.

Q. 22. Did he keep accounts in any other bank?

A. None, to my knowledge.

Q. 23. You thought you were keeping the entire account?

A. Yes, sir; I thought he was keeping the entire account with us.

Q. 24. Were there any outside circumstances, such as paper coming into your bank for collection, or any thing of that character, which tended to show you that Melter was insolvent, or to cause you to suspect his insolvency?

A. There were none; all papers that we had for collection were promptly paid, except some a month after the mortgages; we had one collection which laid over several days. I think it was for the Baker Powder Company, and that was afterward settled and paid by Melter outside of the bank.

The testimony of Eglehoff, cashier, is equally as positive. He saw Melter when he was sick, and Melter told him his account would be made good as soon as he got out. He

(Eglehoff) paid off Melter's hands for gathering ice. This was during Melter's sickness, and as soon as he got well he settled it. He knew nothing to cause him to suspect Melter's solvency. He did not know he kept any other bank account, and supposed he was well informed as to his condition.

The appellee, the bank, being a savings bank, was accustomed to lend a portion of its deposits on long time.

On this point Mr. Kreiger was asked:

Q. Is it unusual or not for your bank to lend on a mortgage for two years?

A. Not at all; we have loaned to persons on five years' time. I think our bank is the only one that has a proviso to loan on mortgage.

Q. Is it common in your bank to loan on long time?

A. Yes, sir; we are a savings bank, and want to invest certain amounts where we can be made safe. The amount we loan to mortgagees is in the neighborhood of $100,000, or a little above that than below it. (Page 59.)

The estimate of values made by Henning and Nettleroth was in August, after the bankruptcy. (Page 55.)

It was made at the request of Mr. Kreiger, as explained by him (pp. 58–9), because he had been applied to by Melter for money to carry out a proposed composition in bankruptcy. He had been informed that these gentlemen were the lowest priced men in Louisville, and if he furnished the money, he desired to have an estimate on a perfectly safe basis.

Before taking the mortgages, Kreiger made an investigation of Melter's affairs, of all that he could learn. He states fully that fact. (Page 67.) He knew the mortgages on his realty, as the records showed them. He took Melter's statement of his other liabilities. He did not think that he owed any bank but the appellee. He did not know that Melter's books were incorrectly kept until July 4th. (Page 73.)

Melter says he agreed to give the mortgages on the 25th or 26th of May. This is untrue. Mr. Russell examined the title to the property between the 20th and 23d of May, and

wrote the mortgages on the 23d of May. (Record, page 78.) They were not signed until the 28th. He expressed himself as perfectly solvent to Mr. Russell. (Page 78.)

Kreiger got the title papers from Melter before he handed them to Mr. Russell on the 20th of May. Mr. Russell had known Melter for years, and regarded him perfectly good. Eglehoff regarded him good, and he was so regarded in the community at the time the mortgages were given. (Page 81.)

It does not appear in the evidence that any debts of Melter were due, except those to the bank. All others had been promptly paid at maturity. No other creditor suspected his solvency. Why should appellees?

Argument.

It is essential to a recovery or a reversal here that the transfer should have been made within two months of the filing of the petition on which the adjudication was had.

The bill alleges (page 2) that "on the — day of ——, A. D. 1877, a petition was filed . . . against Melter . . . that such proceedings were had under said petition, that on the — day of August, A. D. 1877, said Melter was adjudged a bankrupt, etc."

The amended bill (page 8), which seeks to set aside the transfers, reaffirms and adopts all the allegations of the bill, and then proceeds as follows: "The complainant further "shows to the court that the said Ben. Melter, bankrupt, "being then and there insolvent [or in contemplation of in- "solvency] did, within two months before the filing of said "petition against him, . . . execute, acknowledge, and de- "liver unto the defendant, Jacob Kreiger, sr., a certain deed "of mortgage, whereby said bankrupt . . . conveyed to said "defendant, Jacob Kreiger, sr., the following described real "estate. . . . That said deed of mortgage was executed with "a view to give a preference."

The answer "admits that Melter was adjudged a bankrupt on the petition of creditors, etc." (Page 6.)

And to the amended bill his answer (page 15) says: "He "denies that said Ben. Melter, being then insolvent, did, "within two months before the filing of said petition against "him, . . . execute, acknowledge, or deliver unto him a cer- "tain deed of mortgage, etc."

Copies of the mortgages are filed with and as part of the amended bill. (Pages 10 to 12.) They show that the mortgages were made on the 28th day of May, 1877.

There is no proof to show the date of the filing of the petition further than the admission that it was filed on the — day of ——, 1877. This is a case where *time* is material. Pleadings are construed strictly against the pleader.

As the — day of August is alleged as the time of the adjudication, the legal presumption is that the petition was filed on the 31st day of August, 1877. Even construing the pleading liberally in favor of the pleader, the petition under no state of case could have been filed earlier than the 1st day of August, 1877. As the mortgages were given on the 28th day of May, this leaves us out of the two months. It is fatal to appellant's right of recovery. Counsel for appellant cite a rule of the district court to the effect that all material allegations of the bill shall be considered as admitted unless denied by the answer. That rule is not a part of the record, but if this court could take judicial notice of the rule, it would not help appellant. It is denied that the mortgages were made within two months, and there is no proof to contradict this denial. Time is material, and the failure to prove it is fatal.

2. If the petition was filed within the two months, and for the purposes of the argument treating it as having been so done, then, to entitle appellant to recover, he must show, as to the bank,

First, That Melter was then insolvent.

Second, That the mortgage was made by him with a view to give a preference.

Third, That the bank then had reasonable cause to believe him insolvent.

Fourth, That the bank knew the mortgage was made in fraud of the provisions of the bankrupt act.

And as to appellee, Kreiger, he must show,

First, That Melter was then insolvent.

Second, That he made the mortgage with a view to give him a preference.

Third, That Kreiger was a creditor of the bankrupt, or had a claim against him, or was under a liability for him.

Fourth, That he had reasonable cause to believe Melter to be insolvent.

Fifth, That Kreiger knew the mortgage was made in fraud of the bankrupt act; or

Sixth, That Melter, then being insolvent, or in contemplation of insolvency, did, within three months before the filing of the petition against him, make the mortgage with a view to prevent said property from coming to his assignee in bankruptcy, or to hinder, delay, and defeat the provisions of the bankruptcy act.

As Kreiger was president of the bank, and both mortgages were made on the same day, we will treat the cases in the main as one. At the proper place we will call special attention to the facts which pertain to Kreiger that do not apply to the bank.

(*a*). We may safely admit, without damage to our case, that Melter was insolvent at the time the mortgages were made, but he did not know it, nor did he believe it.

(*b*). He did not intend to give a preference. He did not want to give the mortgage, as he testifies, because he thought it unnecessary. This is a question of fact, and a matter of intent. His testimony shows him to be hostile to the bank and its president, therefore what he says must be construed to be as strong as his conscience would admit. In the absence of this intent, there can be no recovery. But it will be argued that as matter of law he must have intended

what was the natural result of his action. The true rule on this subject is laid down in Wilson v. City Bank (17 Wall. 486), as follows: "The general legal proposition is true that "where a person does a positive act, the consequences of "which he knows beforehand, that he must be held to intend "those consequences." Therefore, Melter must have known he was insolvent at the time the mortgages were made, in order to make out a case of legal intendment.

(*c*). Did the parties have reasonable cause to believe Melter insolvent? To show that fact, the appellant introduced Mr. Kreiger, the president of the bank. His testimony is to the effect that, after a careful investigation, he thought Melter could pay all his debts and have a handsome surplus left. If counsel for appellant contend that such facts existed as should have put the bank on inquiry, we answer that the inquiry was made. At the time the mortgages were made, there does not seem to have been any doubt about Melter's solvency. Even as late as the 4th of July we find Melter's attorney in consultation with Mr. Kreiger, seeking additional loans in order to bridge over the present embarrassment. Melter then represented himself as being able to pay his whole indebtedness and have a surplus. (Record, page 47.) The officers of the bank did not then have knowledge of any facts to produce a belief that he was insolvent. They are prudent men, and more than ordinarily intelligent.

Take all the attendant circumstances, and we find no act of theirs which tends to contradict their sworn statement. They released a charter lien on $2,000 of stock after the mortgages were made. They allowed him to still overcheck. They continued to discount his paper. The business went along just as it did before. There was no rupture or cessation of business relations. It was supposed to be only a temporary embarrassment, caused by building houses, which took more money out of his business than was prudent.

And it would have all turned out just as the officers thought, if Melter's statement of his liabilities had been true. That was a matter they could not know.

The case of Grant v. National Bank (97 United States, 80) is very similar to this one.

That was a bill in equity by an assignee in bankruptcy to set aside a mortgage made by the bankrupt within two months prior to his bankruptcy. It was assailed as a preference. The facts of that case are very similar to the facts of this case, except this is a *stronger* case for the *bank*. The question to be determined was whether the creditor had reasonable cause to believe the debtor insolvent at the time the mortgage was made. The distinction was there drawn between reasonable cause to believe and cause to suspect insolvency. The court said, "To make mere suspicion a ground "of nullity in such a case would render the business transac- "tions of the community altogether too insecure. It was "never the intention of the framers of the act to establish "any such rule. A man may have many grounds of suspicion "that his debtor is in failing circumstances, and yet have no "cause for a well-grounded belief of the fact. He may be un- "willing to trust him further; he may feel anxious about his "claim, and have a strong desire to secure it, and yet such "belief as the act requires may be wanting. Obtaining addi- "tional security, or receiving payment of a debt under such "circumstances is not prohibited by the law."

What facts should exist in order that a creditor should have reasonable cause to believe the debtor insolvent? The court says, "He must have a knowledge of some fact or facts "calculated to produce such a belief in the mind of an ordi- "narily intelligent man."

In that case the officers of the bank were distrustful of the debtor's ability to bring his affairs to a successful termination. Yet they supposed there was a "*possibility*" of his doing so. After obtaining the mortgage they allowed him to overcheck his account. "They were alarmed, but they were not without hope." They still gave him temporary accommodations. The court said, "Had they actually supposed him to be insolvent, would they have done this?"

In this case the officers of the bank were not distrustful of Melter's ability to pay out and have a handsome surplus, provided the indulgence asked for was given. They required him to exhibit his financial condition. And on that exhibition they gave him the indulgence asked for, and extended to him other temporary accommodations, by discounting new paper offered, renewing some, and allowing him to overdraw his account. These temporary accommodations amounted in the aggregate to a large sum. "Had they actually supposed him to be insolvent, would they have done this?"

Melter was buoyed up with the hope of getting through his difficulties; his lawyer and confidential adviser shared that hope; the officers of the bank participated in that feeling, or, in the language of the court, "were willing to think that there was a possibility of his succeeding."

The above case of Grant v. Bank is approved and followed in Barbour v. Priest. (103, U. S. 293.)

In the latter case the debtor was insolvent when he made the mortgage, which fact he knew and intended to give the preference. But the creditor did not know his condition, or have cause to believe him insolvent. It was held to be a fundamental condition to a right of recovery by the assignee that the person receiving the conveyance should have reasonable cause to believe the person making it was insolvent, and that it was made in fraud of the bankrupt act.

Counsel for appellant contend that the true construction of the bankruptcy act against fraudulent preferences is given in the cases of Toof v. Martin (13 Wall. 40), and in Buchanan v. Smith (16 Wall. 277), and in Wager v. Hall (16 Wall. 584), and in Merchants National Bank v. Cook (95 U. S. 342), and that while the decision in Grant v. Bank, *supra*, is the law upon the facts of that case, yet the older cases are in conflict with some of the expressions in the last named case, and, not being overruled, should be followed here.

We think there is no conflict, as a brief reference will show:

In Toof v. Martin the facts disclosed that the bankrupts made a statement of their condition to the creditors, which disclosed actual insolvency; that their liabilities exceeded their assets; that the debtors conceded their insolvency, and offered to turn over all their assets to the creditors, if the latter would assume the debts; that their stock had been levied on by the sheriff, which caused a temporary suspension of business; that the creditors sent maturing notes through an agent to collect, which were not paid, and the agent notified them they had better look to their interests, as it was doubtful whether they would be able to collect their debts. In this state of case they sent a member of the firm to look after their interests, who took conveyances of land in part satisfaction of their demands.

Insolvency was admitted and the bankrupts knew their condition, and the only question was whether the creditors had reasonable cause to believe them insolvent. In view of the fact that the statement which the debtors made showed their liabilities to be in excess of their assets, the court had no trouble in finding that the creditors had reasonable cause to believe them to be insolvent. The language used in each particular case must have reference to the facts of that case.

In the case of Buchanan v. Smith, the preference was obtained by means of judgments and executions, and the bill alleged that the debtors *procured* the seizure, making it more than a passive assistance, and the court found that to be true. Looking at the facts of that case as shown in the reports and as explained in the case of Wilson v. City Bank (17 Wall. 487), there can be no doubt of the correctness of the judgment.

In Wager v. Hall the mortgage was made to secure a debt which had been due for more than two years. It was a debt of a merchant for merchandise. The debtor was hopelessly insolvent, and his paper had been protested many times. He was sorely pressed for money, and such peculiar facts existed with reference to the creditors that they were

put upon inquiry. If the creditors had inquired, they would have ascertained that he had been insolvent for more than two years. The most that can be claimed for that case is that, when the creditor was in possession of such facts as put him on inquiry, he is chargeable with such knowledge as he would have obtained had he made the inquiry. And that is the substance of many decisions by the district and circuit courts.

In the case of Merchants Bank v. Cook (95 U. S. 342) a banker, Homans, sold to the Merchants Bank his New York check. It was simply a selling and buying of New York exchange. Of course the buyer supposed the check would be paid or he would not have bought it. The seller did not in fact have any money to his credit in New York. Later in the same day Homans, finding his failure could not longer be delayed, wrote a note to the president of the Merchants Bank, saying he had fears about his check being paid, and inclosed securities to protect the draft. This note and securities were not sent to the bank till the next morning, when Homans's bank closed its doors.

Of course Homans knew he was insolvent, and intended to give a preference. The sole question was whether the bank had reasonable cause to believe him insolvent when the securities were received. The court held that it did. The bank was put on inquiry, and that inquiry would have found the doors of the bank closed, which was known at the time or in a few minutes afterward.

Now if Melter's condition was such as to put the officers of the Masonic Savings Bank on inquiry, the proof shows that diligent and painstaking inquiry was made. It was made in good faith and by the use of every means that could be employed. The investigation developed a solvent estate. We took the books and statements of the debtor to be true. The fact that the books did not show the truth can not be used to our disadvantage when we were ignorant of that fact. Your Honors have said, "All reasonable means, pur-

sued in good faith, must be used for this purpose." (Walbrun v. Babbitt, 16 Wall. 582.) We could not do more and we did not do less.

An attempt is made by learned counsel for appellant, in their brief filed in this court, to distinguish this case from that of Grant v. National Bank, *supra*, and they undertake to show that the facts of the two cases are entirely different.

While the facts of no two cases can well be precisely alike, yet we are not afraid of this comparison. The statement that Kreiger "assumed a sort of guardianship over Melter," and that he counselled Melter to make an assignment in trust for his creditors, and had himself selected as trustee, exists only in the imagination of counsel. It is merely stated incidentally that a few days before bankruptcy Melter made an assignment to Kreiger, but there was no "counselling" shown in the record.

Now in the case of Grant v. Bank, Miller was the bankrupt and Grant the assignee. The bankrupt was a stock-trader, and his business averaged about one hundred and twenty thousand dollars per year. He had been in partnership with one Wallace until June, 1869. They borrowed money from different persons, but mostly from the First National Bank of Monmouth. At the time of the dissolution he was indebted to that bank. After the dissolution Miller borrowed from the First National and the Monmouth National and some Galesburg banks. He commenced borrowing from the Monmouth National Bank in November, 1870, and continued until January 21, 1871, during which time he borrowed over forty thousand dollars. All the time, except about three and a half months (from November, 1870, to January 21, 1871), he was borrowing from the First National of Monmouth. He quit the Monmouth National Bank in January, 1871, because they required him to give three sureties before they would renew his note, or give a mortgage, and in addition they refused to pay a small check he had drawn on that bank, which was presented by the officers

of the first National Bank. In this state of case, with dishonored check and paper, he was unable to renew because of unsatisfactory securities. He went back to the First National Bank, and got that bank to lend him four thousand dollars to take up his paper in the other bank. He gave a note at ninety days, which was renewed at maturity, and at the second maturity it laid over four days, when it was again renewed at ninety days, which would make it mature October 31, 1871.

In the meantime Miller had overdrawn his account some twenty-two hundred dollars, and the record shows it was usually overdrawn. The bank-officers became uneasy on account of things they had heard, and induced Miller, by giving him three hundred dollars cash, to execute a note for sixty-five hundred dollars, which included the overdraft and the note and the cash advanced, and to give as security for this note a deed of trust on all his real estate. This was done on the 16th of September, just forty-five days before the four-thousand-dollar note matured.

About this time Miller was not shipping any stock, because the bank would not let him have any money. (Page 33 of that record.) In November, 1870, he had quit this bank because they refused to pay his check for one hundred and fifty dollars. (Record, page 21.) Miller was overdrawn in the Monmouth National nearly all the time (R. 44), and his account at the First National shows a similar state of account. (R. 80.)

As early as June, 1871, Wallace, the security of Miller, told the president of the bank that Miller would have to mortgage his land, and that he was getting *shaky* of Miller and intended to cut loose from him. About the middle of September he had another conversation with him, when the president called him into the bank and asked him to see Miller and try to get him to give a mortgage for what he owed the bank, saying Miller had to do something, that he had run behind about twenty-three hundred dollars; that he

had been trying to get him to give a mortgage, and asked Wallace to tell him that if he would give the mortgage it should not be put to record. Wallace saw Miller and told him what the president said, and he agreed to make the mortgage if the bank would let him have three hundred dollars and keep the mortgage a secret. It was accordingly done.

Now it is gravely argued by counsel that the facts of our case are not so strong for the bank as that case.

The note in this case for six thousand dollars, which matured in April, 1877, was an original paper. (Record, 66.) It laid over under an agreement with Melter, because he wanted more money and longer time, and it was agreed beforehand that it should be renewed, but with different security. On this point Mr. Kreiger says: "We were satisfied to loan Mr. Melter the money, thinking him perfectly good, but still wanted other names in addition to it, especially as he had said that he would bring other names before." (Record, page 65.) This note was originally given 19th of December, 1876, to take up some over-drafts, but was not credited on the books of the bank until about the 23d of January, 1877, when his overdraft was less than eighteen hundred dollars. During the time this note was lying over, Melter's drafts amounted to twice as much as his deposits. In contrast with this, the record shows that from the 31st of August to the 18th of September Miller checked out only twenty-four dollars, and deposited eighteen hundred and seventy-eight dollars.

Counsel argue that it was out of the usual course of business for a butcher to give a mortgage to secure a debt due, but that it was altogether usual for a trader to give a mortgage to secure a debt not due, and under a promise to keep it secret.

(*d*). There are some particular facts which apply to Mr. Kreiger that do not apply to the bank. He was not a creditor of Melter, and had no claim or demand against him.

When the mortgages were to be made, he found a small encumbrance already existing on one piece of property. The charter of the bank prohibited it from lending on a second mortgage. He then agreed to indorse the note for $6,000, provided the mortgage was made to him as indemnity. He did indorse the note, and the mortgage was made to him. The debt was contracted at the time the liability was incurred. The bankrupt act expressly protects that character of security.

It can not therefore be assailed as a preference. The note so indorsed was discounted by the bank, and Kreiger became, and still is, liable as indorser. The learned District Judge was of opinion that Kreiger took this mortgage in trust for the bank. It was not so alleged in the bill. He was sued as a creditor, or under a liability for the bankrupt, and as such received the alleged preference. The appellant must stand or fall by his pleading. Then the proof was the reverse. If he held it in trust for the bank it should have been assailed as a preference to the bank. This is what Kreiger says of his liability:

Q. Did Melter execute a note to the bank for this same debt, or a note to you at the time the mortgage was executed?

A. Yes, sir; a note to me.

Q. You indorsed the note?

A. Yes, sir.

Q. And became liable on it?

A. Yes, sir, and am liable now.

Q. And you took a mortgage as security?

A. Yes, sir, as security.

There is not a word in the pleadings nor a line in the evidence to indicate that Kreiger indorsed the note and took the mortgage in trust for the bank. The bank is not sued on account of that note or mortgage. On the contrary, the bill alleges that Melter made this mortgage with a view to give a preference to Kreiger as "creditor." The right given

the assignee to set aside certain transfers is given by statute. In the absence of statute the transfer is good. The statute is in restraint of a common-law right. To recover under the statute there must be a violation of its provisions, and the pleadings must state the facts constituting the violation, and recovery must be had, if had at all, under the pleadings.

(*e*). Were the mortgages in fraud of the bankrupt act?

The old thirty-fifth section of the bankrupt act provided that the creditor receiving the preference must have reasonable cause to believe the transfer was made in fraud of the provisions of the act before a recovery could be had.

The amendment of June 22, 1874, changed that provision so that the party receiving the transfer must *know* that a fraud on the act was intended before it could be set aside.

Under the old section there was much room for shadowy speculation, which led to great confusion. So Congress, in making the amendment, made the material alteration of requiring knowledge in place of reasonable cause. They intended something by the amendment. What was that intent?

In Metcalf v. Officer (2 Fed. R. 640) Judge Nelson said, "The amendment to the bankrupt act substituting 'knowl-"edge' in the place of 'reasonable cause to believe,' was "undoubtedly intended to uphold payments which might be "fraudulent before the amendment, and since the amend-"ment such facts and circumstances must exist as would "induce not merely belief, but knowledge that a fraud on "the act was intended."

It was held by Judge Wheeler, in Campbell v. Waite (16 Bank Reg. 95), that although the debtor is insolvent, and the creditor receiving a mortgage knows he is insolvent, yet that is not enough to invalidate a mortgage made since the amendment of 1874. He must know of an intent upon the part of the debtor to place the mortgaged property beyond the reach of other creditors in fraud of the act.

In the case of Singer v. Sloan (3 Dillon) the court said, "The counsel for the assignee makes the further point that "'having reasonable cause to believe' and 'knowing' are, "in contemplation of law identical, and the averment of the "former is legally equivalent to the averment of the latter. "In other words, that Congress, by carefully requiring the "word 'knowing' to be three times inserted in section 35, "and by changing section 39 in this respect to conform to "the change made in section 35, meant nothing and accom- "plished nothing. I can not agree to that view." Judge Dillon then says it is not necessary for the purposes of that case to say what knowledge must be proved.

In Dickinson v. Adams (4 Sawyer, 258) the court said: "But admitting that the proofs show that the debtors were insolvent, and even that a fraud on the act was intended by them, it must further be shown that the defendant knew of this fraudulent intent; in other words, that there was a guilty collusion between the parties to evade and defeat the operation of the act." And in that case, after reviewing all the evidence, the court concluded that in such cases it must be established by proof "that not only the bankrupts intended to dispose of their property in fraud of the act, but that the defendant knew such to be their intention, and guiltily combined and colluded with them to carry it into effect."

This court held in Clark v. Iselin (21 Wall. 375) that "there must be guilty collusion to constitute the fraudulent preference condemned by the statute." And again, on page 377, in speaking of the object of the bankrupt act, said: "It was to secure equality of distribution of that which insolvents have when proceedings in bankruptcy are commenced, and of that which they have collusively with some of their creditors attempted to withdraw from ratable distribution, with intent to prefer some creditors over others."

We therefore say there must be "guilty collusion" between the debtor and creditor, in order to constitute a fraud

on the act. Before this "collusion" can exist there must be knowledge of the insolvent condition of the debtor.

There is but one case that we have found where this clause of the mandatory act of 1874 has been before this court. That is the case of Rogers v. Palmer (102 U. S. 263.) And we think that case settles what is a fraud on the act. At the conclusion of the opinion, on page 268, the court said: "That the attor-"neys of the elder Palmer (the creditor) and the son (the debt-"or) were aware of the insolvent condition of the latter, and "were coöperating to have his property seized on execution "before the bankrupt law could be enforced, and with intent "to defeat its operation on the son's property, we think is "quite clear. And this we understand to be a fraud upon "the bankrupt law, where the debtor contributes actively to "that end."

There the attorneys of the creditor were also the attorneys of the debtor, and knew him to be insolvent, and undertook to get a preference, and did get it, only by the active coöperation of the debtor, and the court held that the knowledge of the attorneys was the knowledge of the creditor.

This case has none of the elements of active or passive "coöperation" for such a purpose. Neither party intended to violate any right or law. Neither party regarded Melter insolvent. With that element lacking, it is impossible for them to have contemplated a fraud.

The *intent* with which such transfers are made must always exist, and must be to *prefer* before a recovery can be had. It must be alleged and proven. Mere insolvency is not sufficient. He must, in addition to being insolvent, intend to prefer.

We think the true rule to be this, as laid down by the Supreme Court of Massachusetts, in Jones v. Howland (8 Met. 377), "That though insolvency in fact exists, yet if the debtor "honestly believes he shall be able to go on in his business, "and with such belief pays a just debt, without a design to "give a preference, such payment is not fraudulent, though

"bankruptcy should afterward ensue. And, upon the other "hand, if the debtor, being insolvent and knowing his sit- "uation and expecting to stop payment, shall then make "payment or give security to a creditor for a just debt with "a view to give him a preference over the general creditors, "such payment or giving security is fraudulent against the "creditors. . . . It rests upon the intent with which the act "was done, and the intent is to be proved as a fact, either "by direct evidence or as the necessary and certain conse- "quence of other facts clearly proved."

And in 6 Law Rep. 266 (*In re* Pearce), Prentiss, J., said, "A man may be insolvent, and yet go on with his business "with the real hope of retrieving his affairs, and with a *bona* "*fide* intention and expectation of saving himself from break- "ing or failing and of being able to pay his debts; and a "payment or transfer under such circumstances, though vol- "untary, would not be a preference within the meaning of "the law."

Applying these principles to the case at bar, the appellant can not hope to recover.

It is an easy matter, in looking back at events that have happened, to see errors and point to results that have occurred, and found an argument to show how easy it would have been to see that such acts might lead to different results from those anticipated. But the law wisely looks only at the facts and circumstances as they existed at the time; it takes human nature and frailties as it finds them. "The result is not always evidence of the supposed intent." As said by the court, in Jones v. Howland, *supra*, "When we "look *back upon events* that have happened, we stand in a "different position; we behold with a clearer vision as we "embrace within our glance the beginning and the end, the "act and the consequences. But the man who is doing the "act may contemplate a very different result. His judgment

"may be biased by his wishes, and sanguine feelings may be "the cause of overlooking difficulties which to a more quiet "temperament might appear insurmountable. Disappoint- "ments also may take place which were not anticipated."

It may have been unwise in Melter to hope to extricate himself from his troubles. It may have been unwise in the bank to share his hopes and allow him to continue overdrawing. But their motives were good. It will not do to say that men in embarrassed circumstances can not receive pecuniary aid from their friends. The law does not prohibit it. In the case of Tiffany v. Lucas (15 Wall. 422) this court had occasion to review such facts, and said, "There is no "arbitrary rule by which the good faith of a transaction can "be tested. It may be that ordinary men in similar circum- "stances would have acted differently, but this is no reason "to condemn the conduct of men like Darby. . . . That he "failed proves nothing, for other men, whose integrity was "above suspicion, have also failed."

Melter thought, and honestly thought, that he could surmount all his troubles. The bank and its officers shared that feeling.

As said by the court in Tiffany v. Boatman's Institution (18 Wall. 390): "If it were clear at the time to his mind "(as we think it was)—notwithstanding the real state of his "affairs did not justify the belief—his conduct was not, in "fact, fraudulent, nor is it condemned by any provision of "the bankrupt law."

All of the things enumerated in the statute must concur before the transfers can be set aside. And, as said by this court in Clark v. Iselin (21 Wall. 375), "they must concur "not only in fact, but in time also. The words of the thirty- "fifth section admit of no other construction. The debtor "must be insolvent, or contemplating insolvency, *when* the "alleged preference is given. And he must *then* have in view "giving a preference."

We think the record shows that the alleged preference was given more than two months before the bankruptcy petition was filed. In point of *time* the transfer is not within the provisions of the act.

We think we have shown—and the record abundantly sustains us—that

1. Melter did not intend to give a preference.

2. That Kreiger did not believe, or have reasonable cause to believe, that Melter was insolvent.

3. That the transfers were not made in fraud of the bankrupt act.

4. That as to Kreiger's mortgage, it was made at the time the liability was created.

We therefore respectfully ask an affirmance.

J. P. HELM,
W. O. DODD.

1.16.

108-16

Supreme Court of the United States.

No. —, Original.—October Term, 1879.

The State of New Hampshire, Complainant,

vs.

The State of Louisiana.

BILL OF COMPLAINT.

To the Honorable the Judges of the
Supreme Court of the United States.

The State of New Hampshire brings this its bill of complaint against the State of Louisiana and Edward A. Burke, who is a citizen of the State of Louisiana, and who is treasurer of the said State of Louisiana; and against Louis A. Wiltz, who is a citizen of the State of Louisiana and governor of the said state; and against Sam. McHenry, who is lieut.-governor of the State of Louisiana, and is a citizen thereof; and against Allen Jumel, who is auditor of the State of Louisiana, and a citizen thereof; and against William A. Strong, who is secretary of the State of Louisiana, and a citizen thereof; and against Robert N. Odgen, who is speaker of the house of representatives of the State of Louisiana, and a citizen thereof; and against Samuel H. Kennedy, who is fiscal agent of the State of Louisiana,

and a member of the board of liquidation thereof, and a citizen thereof. And thereupon your orator alleges and shows that all and singular the defendants before mentioned, other than the State of Louisiana, are citizens of the said State of Louisiana, and hold respectively the offices as hereinabove stated.

Your orator further shows that prior to the year 1874, the State of Louisiana had contracted indebtedness to a large amount, to wit, to the amount of about eighteen millions of dollars, for which the said State of Louisiana had issued certain evidences of its said indebtedness. That complaint had been made by the State of Louisiana that certain of such indebtedness was fraudulently contracted, and that the said state was not justly liable to pay the same; and on the other hand, the persons owning the said indebtedness claimed that the same was valid, and that the state was legally bound to pay the whole thereof.

Your orator further shows that under these circumstances, and in order to settle the said conflicting claims, and in order forever to liquidate and settle the indebtedness for which the said State of Louisiana was liable, and in order to make full accord and satisfaction of all the said claims existing against the said State of Louisiana, and in order fully and forever to secure such claims as should be agreed to be valid, the said State of Louisiana by its legislature duly convened and assembled did, in the year 1874, duly pass and enact a certain law known as act number three of the statutes of 1874 of said state.

That in and by section one of said act, it was provided that, for the purpose of consolidating and reducing the floating and bonded debt of the said state, the governor, lieut.-governor, auditor, treasurer, secretary of state, and speaker of the house of representatives were authorized to cause to be prepared and issue bonds, to be known as Consolidated Bonds of the State of Louisiana, of the denomination of one hundred dollars, five hundred dollars, and one thousand dollars, to the amount of fifteen millions of dollars, or so

much thereof as should be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively and made payable to bearer, and to bear interest at the rate of seven per cent., payable semi-annually in the city of New York and the city of New Orleans, on the first days of July and January of each year, and that coupons for such interest should be annexed to such bonds.

That by section two of said act it was provided that the individual defendants above named, except the defendant Kennedy, should constitute a board of liquidation, and that a majority of said board should elect a fiscal agent for the state, who should be a member of the said board.

That by section three it was provided that the said bonds should be signed by the governor, auditor, and secretary of state, and that the coupons thereon should be signed by the auditor and treasurer, and that, when so prepared, said bonds should be exchanged by the board of liquidation for all outstanding bonds of the state, and all valid warrants drawn previous to the passage of said act, except certain warrants therein specified, at the rate of sixty per cent. in consolidated bonds for one dollar in outstanding bonds or warrants.

That by section fifth of said act it was provided that the said consolidated bonds therein authorized should be held and used by said board only for the purposes of exchange as aforesaid.

That by section seven of said act it was provided that a tax of five and one-half mills on the dollar of the assessed value of all real and personal property, in said State of Louisiana, was thereby duly levied, and should be collected for the purpose of paying the interest and principal of the consolidated bonds therein authorized, and that the revenue derived therefrom should be, and was thereby, set apart and appropriated for that purpose, and to no other. And that it should be deemed a felony for the fiscal agent, or for any officer of the state or board of liquidation, to divert the said

fund from its legitimate channel as aforesaid, and that upon conviction thereof the parties so doing should be liable to punishment.

That it was further provided by section seven that if, during any year, there should be a surplus arising from said tax after paying all the interest falling due in that year, such surplus should be used for the purchase and retirement of bonds authorized by said act, such purchases to be made by the said board of liquidation from the lowest offers after due notice.

That it was by said section seven further provided that such interest tax should be a continuing annual tax until the said consolidated bonds should be paid and redeemed, principal and interest; and that the said appropriation should be a continuing annual appropriation during the same period, and that said levy and appropriation should authorize and make it the duty of the auditor and treasurer, and the said board, respectively, to collect said tax annually, and pay said interest, and redeem the said bonds until the same should be fully discharged.

That by section ten of said act it was provided that any judge, tax-collector, or any officer of the state obstructing the execution of said act, or any part of it, or failing to perform his official duties thereunder, should be deemed guilty of a misdemeanor, and on conviction should be punished.

That by section sixteen of said act it was provided that no court or judge thereof should have power to enjoin the payment of principal or interest of any bond issued under said act, or the collection of the special tax therefor; and that by section eleven of said act it was provided that each provision of said act should be, and was thereby, declared to be a contract between the State of Louisiana and each and every holder of the bonds issued under said act.

Your orator further shows that on the same day on which the said act number three was passed and adopted the said legislature of the State of Louisiana duly enacted a certain

other law, known as act number four of the said year, wherein and whereby they provided for the submission to the people of the State of Louisiana of certain amendments to the constitution of the said state, and that by one of the proposed amendments to be submitted according to said act it was provided that the issue of consolidated bonds authorized by the act hereinbefore described and referred to as act number three, was thereby declared to create a valid contract between the state and each and every holder of the said bonds, which the state should by no means and in no wise impair.

That said bonds should be a valid obligation of the state in favor of any holder thereof; and that no court should enjoin the payment of principal or interest thereof or the levy and collection of the tax therefor. That to secure such levy, collection, and payment, the judicial power should be exercised when necessary; that the tax required for the payment of the principal and interest of said bonds should be assessed and collected each and every year until the said bonds should be paid, principal and interest, and that the proceeds thereof should be paid by the treasurer of the state to the holders of said bonds, as the principal and interest of the same should fall due, and that no further legislation or appropriation should be requisite for the said assessment and collection and for such payment from the treasurer.

That the said constitutional amendment so provided to be submitted to the people was duly submitted to the people of the State of Louisiana and was by them duly and legally adopted, and became a part of the constitution of the State of Louisiana.

That subsequent to the passage of said act, and subsequent to the adoption of the said amendment to the constitution of the State of Louisiana, a large number of valid outstanding bonds and warrants of the State of Louisiana described in section three of said act were duly surrendered to the said board of liquidation, and bonds of the State of Louisiana, such as are described in section one of said act, were

duly issued to the said holders of such prior bonds and warrants, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants.

That the State of Louisiana, under and pursuant to the said act number three, did thereupon make, execute, and deliver its certain bonds, known as consolidated bonds of the State of Louisiana, of the denomination of one hundred dollars, five hundred dollars, and one thousand dollars; that each of said bonds was signed by the governor, auditor, and secretary of state of the State of Louisiana, and that the coupons thereon were signed by the auditor and treasurer of the said State of Louisiana. That in and by each of the said bonds the State of Louisiana promised to pay to the bearer thereof the sum in said bonds mentioned, according to the denomination thereof, in forty years from the first day of January, 1874, and to pay interest thereon at the rate of seven per cent. per annum, payable semi-annually in the city of New York and city of New Orleans, on the first days of July and January of each year; and that to each bond coupons for such interest were annexed, wherein and whereby the said State of Louisiana promised to pay the semi-annual interest on said bonds on the first days of July and January in each year respectively.

That in and by each of said bonds it was further stated that the same was issued under the authority of and in conformity to an act of the general assembly of the State of Louisiana, approved January 24th, 1874, being act No. three of the session of 1874, and that on the back or outside of each of said bonds there was printed by the said State of Louisiana a statement that the same was issued under the authority of the act of the general assembly, approved January 24th, 1874, and that the payment of the principal and interest of the said bonds was provided for by the levy of an annual tax fixed and guaranteed by the constitution of the state, and not repealable by legislative enactment.

Your orator further shows that such consolidated bonds

were duly executed and issued by the State of Louisiana in the way and manner and form aforesaid, to the amount of about twelve millions of dollars, more or less; the precise sum your orator is unable to state. That your orator is the owner and holder and bearer of six of said bonds so issued pursuant to the said act of the general assembly of the State of Louisiana, and pursuant to the amendment to the constitution of the said state adopted at said time. That each of the said bonds so owned and held by your orator is of the denomination of one thousand dollars, and that to each of the said bonds is attached an interest coupon, due January 1st, 1880, wherein and whereby the said State of Louisiana promised to pay to the bearer thereof on the said first day of January, 1880, the sum of thirty-five dollars, being interest on the said bond to which said coupon is attached.

Your orator further shows that in each of the said years since 1874, a portion of the tax so assessed has been collected, and that a portion of the tax so assessed has been delinquent, and is in process of collection. That in each year part of the interest on the said bonds, including the bonds so held by your orator, has been paid by the said State of Louisiana; and that in each year a part of the interest on the said bonds has remained unpaid; and that in each year there has remained a certain sum of cash to the credit of the said interest fund of said bonds. That although demanded, the State of Louisiana has wholly neglected and omitted and declined to pay the interest on the said bonds accruing January 1st, 1880, and has caused it to be officially promulgated and stated that the said State of Louisiana would not pay the interest on said bonds falling due January 1st, 1880, or pay the coupons falling due for such interest. That during the year 1879 there has been collected a large amount of money, the proceeds of the tax by said act number three, levied and assessed and appropriated, and that a large amount thereof has already been collected by the treasurer of the State of Louisiana, and is

in the hands of the state treasurer of the said State of Louisiana, and in the hands of the said officers of the said State of Louisiana who compose the board of liquidation, as provided in said act; that the said board of liquidation has heretofore duly elected Samuel H. Kennedy as fiscal agent of the said State of Louisiana, and the said Kennedy became and has been a member of the said board since said election or appointment. That in the ordinary course of proceedings in the said State of Louisiana, money as collected by the tax-collectors and subordinate officers for the taxes of the year 1879, is now being day by day, and will for sometime continue to be day by day paid over by the said officers to the treasurer of the state; and that the said treasurer will continue from now for sometime to come to to be in the receipt of money that has been collected by the tax-collectors, proceeds of tax collected by section seven of said act for the year 1879; and that all of the said money so collected, and to be collected by the treasurer of the state, and by the defendants, members of the said board of liquidation, is applicable and has been appropriated by the said act to the payment of interest on the said bonds; and that a large amount thereof has been collected and is now being collected to meet and pay the coupons on said bonds due on the first day of January, 1880.

Your orator further shows that there is now in the hands of the said defendants, proceeds of the said tax levied and collected during the several years from 1874 to the present time, the sum of two hundred and thirty-five thousand one hundred and three dollars and eight cents ($235,103.08), and that of the said sum one hundred and thirty-three thousand three hundred and fifty-one dollars and thirty-three cents ($133,351.33), has been collected and paid into the hands of the defendants and into the hands of some one of them, and in and during the year 1879.

Your orator further shows that in the year 1879 the people of the State of Louisiana duly passed and adopted a certain constitution or organic law to take the place of the

constitution theretofore existing. That the said constitution, so adopted in the year 1879, has gone into effect; that officers have been elected under it, and that all the defendants are officers of the said state who have been elected under and pursuant to said constitution, except the defendant Burke. That as to said defendant Burke, it was provided in said constitution that he should remain and continue in the office of treasurer of the State of Louisiana, which he then held, without any election; and excepting also the defendant Kennedy, who holds the position of fiscal agent pursuant to the appointment of the said board of liquidation. That a part of the constitution so adopted by the State of Louisiana in the year 1879, is known and described as a debt ordinance, and that the same is in the words and figures following, that is to say:

"ART. 1. Be it ordained by the people of the State of Louisiana in convention assembled, That the interest to be paid on the consolidated bonds of the State of Louisiana, be and is hereby fixed at two per cent. per annum for five years from the first of January, 1880, three per cent. per annum for fifteen years, and four per cent per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all state tax being hereby fixed at six mills; *Provided*, The holders of consolidated bonds may, at their option, demand, in exchange for the bonds held by them, bonds of the denomination of five dollars, one hundred dollars, five hundred dollars, one thousand dollars, to be issued at the rate of seventy-five cents on the dollar of bonds held and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent. per annum, payable semi-annually.

"ART. 2. The holders of the consolidated bonds may at any time present their bonds to the treasurer of the state, or to an agent to be appointed by the governor—one in the city of New York and the other in the city of London—and the said treasurer or agent, as the case may be, shall indorse or stamp thereon the words, 'interest reduced to two per cent. per annum for five years from January 1st, 1880, three per cent. per annum for fifteen years, and four

per cent. per annum thereafter;' *Provided*, The holder or holders of said bonds may apply to the treasurer for an exchange of bonds, as provided in the preceding article.

"ART. 3. Be it further ordained, That the coupon of said consolidated bonds falling due the first of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the state government."

That by section 209 of said constitution it was provided that the state tax on property for all purposes whatever, including expenses of government, schools, levees, and interest, should not exceed in any one year six mills on the dollar of its assessed valuation; that a tax at that rate would be insufficient to raise the money necessary to pay the interest on the said consolidated bonds at the rate and manner provided in said act of 1874. That all and singular the defendants herein intend to divert the proceeds of the tax levied by the said act of 1874 for the year 1879, for the purpose of paying the interest and principal of the consolidated bonds by said act authorized, six of which are held by your orator as aforesaid, from the payment of said interest which fell due the first day of January, 1880, and from the payment of the coupon falling due on said date, to defray the expenses of the state government, as provided in said new constitution adopted in 1879, and that all of the said defendants, as well the individual defendants as the State of Louisiana, intend to divert all the proceeds of the said tax levied for the year 1879, under the said act as aforesaid, which are already collected or which may hereafter be collected and may come to the hands of the said defendants or any of them, from the payment of interest as provided in said act to the purposes of defraying the expenses of the state government, as provided in said constitution.

Your orator further shows that it is claimed by the said defendant, the State of Louisiana, and by each and every of the individual defendants, that the provisions of the constitution adopted in 1879 relative to the state debt of the State of Louisiana are valid and effectual provisions, and

that thereby and in consequence thereof, the rate of interest upon the bonds held by your orator is reduced from the amount expressed in said bonds to the amount expressed in said constitution, to wit, to the amount of two per cent. per annum for five years from January 1st, 1880, and three per cent. per annum for fifteen years, and four per cent. per annum thereafter, and that the interest on said bonds falling due January 1st, 1880, is wholly lost to your orator, and that the said defendant, the State of Louisiana, is not bound to pay the same.

That each and every of the said individual defendants purpose and intend to carry out the provisions of the said constitutional amendment of 1879, and to divert the funds in their hands, proceeds of the tax levied by the act of 1874, from the purpose of paying the interest on said consolidated bonds, and purchasing the said bonds, as in said act provided, to the purposes stated and provided in said constitution of 1879. That if the said defendants are allowed to divert the sums now in their hands, and that may hereafter come into their hands—proceeds of the tax levied by the act of 1874 in and for the year 1879—from the purpose of paying the coupon which fell due January 1st, 1880, and from the payment thereof, your orator would be remediless in the premises. That the State of Louisiana is without other funds to pay, or from which your orator could compel or require payment of the said coupon, and has made no provision for the payment thereof and repudiates the same, and that your orator has no remedy at law in the premises.

To the end, therefore, that it may be adjudged that the said bonds and the said act number three of the session of 1874, and the said constitutional amendment of 1874, are, and constitute, a valid contract between the said State of Louisiana and your orator, and that all and singular the provisions of the said act and of the said constitutional amendment and of the said bonds are valid and effectual, and still continue and remain valid and effectual, and to

the end that the said defendants and each of them may be enjoined and prohibited from diverting the funds in the hands of them or either of them or any of them, the proceeds of the tax levied by the act of 1874, and the constitutional amendment of 1874, from the payment of the interest and coupons, as in said act provided, either to defray the expenses of the state government or for any other purpose, and may be enjoined from parting with the said fund collected or to be collected, except as provided in said act number three, and to the end that it may be adjudged that the said provisions of the constitution of 1879, in so far as they in any way conflict with the contract expressed in said bonds, and in the act of 1874, and the constitutional amendment of 1874, are void and of no effect as being in conflict with the Constitution of the United States, and impairing the obligation of the contract with your orator, and to the end that the third article of said constitution in relation to said state debt, providing that interest taxes collected to meet the coupons due January 1st, 1880, were thereby transferred to defray the expenses of the state government, and providing that the said coupons falling due the 1st day of January, 1880, which were thereby remitted, may be adjudged and declared to be void and of no effect as in conflict with the provision of the Constitution of the United States forbidding any state to pass any act impairing the obligation of contracts.

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, commanding and enjoining the said defendants and each of them, in manner and form as is hereinabove prayed for, and may it please your honors also to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, and directed to the said State of Louisiana and to the said Edward A. Burke, who is a citizen of the State of Louisiana and who is treasurer of the said State of Louisiana, and to the said Louis A. Wiltz, who is a citizen of the State of Louisiana and governor of the said state, and

to the said Sam. McHenry, who is lieut.-governor of the State of Louisiana and a citizen thereof, and to the said Allen Jumel, who is auditor of the State of Louisiana and a citizen thereof, and to the said William A. Strong, who is secretary of the State of Louisiana and a citizen thereof, and to the said Robert N. Ogden, who is speaker of the house of representatives of the State of Louisiana and a citizen thereof, and to the said Samuel W. Kennedy, who is fiscal agent of the State of Louisiana and a member of the board of liquidation thereof, and a citizen thereof, therein and thereby requesting them and each of them, under a certain penalty, on a certain day therein named, to be and appear before this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide by the said order, direction, and decree as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray.

THE STATE OF NEW HAMPSHIRE,
By MASON W. TAPPAN, *Attorney-General.*

WHEELER H. PECKHAM,
Solr. and of Counsel.

DISTRICT OF COLUMBIA, }
CITY OF WASHINGTON. }

Wheeler H. Peckham, of the city of New York, being duly sworn, says he is solicitor and counsellor of this court, has been retained by the attorney-general of the State of New Hampshire as assistant counsel for complainant in this case, and knows contents of the foregoing bill of complaint, and has enquired and investigated as to the truth of the allegations therein made. That such allegations are true to the best of deponent's knowledge and belief.

WHEELER H. PECKHAM.

Sworn to before me, this 26th January, 1880.

D. W. MIDDLETON,
Clerk Sup. Ct. U. S.